

CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI.

APRIL TERM, 1877, AT JEFFERSON CITY.

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STATE *ex rel.* R. L. BILLINGSLEY, *et al.*, Appellants, *vs.* CLINTON  
E. SPENCER, *et al.*, Respondents.

1. *Partnership property—Rights of members to exemption of, from execution.*—  
The members of a firm are neither severally or jointly entitled to partnership  
assets exempted to heads of families under § 11 of the statute touching  
execution.

*Appeal from Jasper County Circuit Court.*

*E. J. Montague*, for Appellants, cited: *Pond vs. Kimball*,  
101 Mass. 105; *Guptel vs. McFee et al.*, 9 Kan. 30; Cent. L.  
J. No. 17, April 23, 1875, 264; *Wagn. Stat.* 603, § 9.

*W. H. Phelps*, for Respondents, cited: *Stewart vs. Brown*,  
37 N. Y. 350; *Knapp vs. Bartlett*, 23 Wis. 88; *Gilman vs.*  
*Williams*, 7 Wis. 287; *Kiskaddon vs. Jones*, 63 Mo. 190.

HENRY, Judge, delivered the opinion of the court.

In September, 1874, R. L. Billingsley & Co. commenced a  
suit by attachment against ——— Kent and ——— Black, and  
said attachment was, by defendant Spencer, then sheriff of Jasper  
county, levied upon personal property belonging to Kent and Black  
as partners. Kent and Black each were the head of a family,  
and neither of them owned any property mentioned in the first  
and second subdivisions of the ninth section, of chapter 55,  
*Wagn. Stat.* 603. Kent had household goods of the value of

three hundred dollars, and Black had household goods of the value of one hundred and twenty-five dollars, and a set of carpenter's tools worth about thirty-five dollars. The partnership goods levied upon by the sheriff were of the value of one hundred and fifty dollars. Defendants, Kent and Black, claimed the property under the eleventh section of chapter 55, which provides that "each head of a family, at his election, in lieu of the property mentioned in the first and second subdivisions of section nine, may select and hold exempt from execution any other property real, personal or mixed, or debts and wages, not exceeding in value three hundred dollars."

The sheriff allowed their claims, and returned to them the property he had attached. Billingsley & Co. prosecuted their said suit, and at the May term, 1873, of the common pleas court of Jasper county, recovered a judgment against Kent and Black for \$105.50. Afterwards a special execution was issued on said judgment and placed in the hands of the sheriff of Jasper county, one Zane, who duly returned thereon that he could not find the attached property, and the present suit was instituted against Spencer, and the other defendants, his sureties on his official bond, to recover for the alleged breach of duty on the part of Spencer, in delivering to Kent and Black the attached property.

There was a trial in the common pleas court of Jasper county, which resulted in a verdict and judgment for defendant, from which an appeal has been duly taken by plaintiff to this court, and the only question presented for determination is whether one or more of the members of a partnership, are severally or all of them jointly entitled to partnership assets, to the amount specified in section eleven as exempt from execution under sections nine and eleven?

They cannot claim the exemption as a partnership, for a partnership cannot be the head of a family. If they can severally claim, how is the officer to determine what specific portion of the assets belongs to the claimant, without first making a settlement of the partnership accounts, as between the partners, and also as between the firm and its debtors and creditors?



Neither partner exclusively owns any of the assets, nor until a final settlement of the partnership business could the officers determine the interest of either member in the assets of the firm. The amounts of money invested by them respectively, would be no criterion, for the partner who furnished in the first instance the largest amount of capital, on final settlement might be found to have no interest whatever in the assets then on hand. Supposing a debt due to the firm be garnished, could one partner claim the exemption out of that indebtedness, and the officer allow him individually a given amount, and the plaintiff in the execution recover the balance against the debtor, thus dividing into two, or more, his single obligation to the firm?

The difficulties are not obviated, where, as in the case at bar, all the partners severally claim the exemption, for still there would have to be a settlement of the partnership business in order to determine what to allow each member. The state of the accounts, as before remarked, might be such that one, or more of the firm, would have no interest whatever, and the others would have an excess over the amount exempt; and if the officer allowed each his exemption the creditor would be prevented from having applied to his debt that excess thus given to a partner, or partners, who have no interest in the assets. If instead of severally claiming, they make a joint claim to the exemption of the amount specified in the eleventh section, it might be that each of the members, but one, owned all of the property in kind and amount specified in the eleventh section, and had no right to the exemption.

The fact that the difficulties suggested could not have occurred in the case at bar, is no answer to the argument, for that they would occur in a vast majority of cases, is conclusive against the construction of the statute contended for by respondent. The law declares the exemption in favor of the head of a family, and this precludes the officer from allowing it to the partners jointly.

We are satisfied that the eleventh section does not embrace either a partnership, or the members of the firm severally or jointly, as to partnership property, and this view is sustained by *Pond vs. Kimball*, 101 Mass. 105; *In re Handlin* 3 Dill. 290;

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State v. Taylor.

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Bonsall vs. Conley 44 Penn. St. 447; Guptil vs. McFee, 9 Kas. 30. The courts of New York, Wisconsin and North Carolina, hold otherwise, but the weight of authority and argument we think, sustains the conclusion we have reached.

Judgment reversed and cause remanded. The other judges concurring except Sherwood Judge, absent.

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STATE OF MISSOURI, Respondent, *vs.* WILLIAM W. TAYLOR, Appellant.

1. *Indictment—Murder—New trial—Prejudice of juror, what sufficient to warrant.*—Where it appeared, on a motion for a new trial on an indictment for murder, that one of the jury had formed such a prejudice against the accused that he could not be an impartial juror, the prisoner would be entitled to a retrial, although the juror had formed no opinion as to his guilt or innocence, and his prejudice was formed merely upon rumor, and not upon evidence at the trial. In such case the grant of a new trial does not turn on the question of the competency or incompetency of the juror alone, but on the question whether the prisoner will have an impartial trial.
2. *Murder—Threats, etc., made by deceased and not communicated to prisoner.*—On an indictment for murder, proof of threats made by deceased against the prisoner, or wrongs done or slanders uttered, touching the family of the prisoner, knowledge whereof is not shown to have been communicated to the latter, is incompetent.

*Appeal from Webster County Circuit Court.*

*Nesbit & Ferguson, with Smith & Wisby, for Appellant,* cited: Const. Bill of Rights, § 22; State vs. Burnside. 37 Mo. 343; State vs. Wyatt, 50 Mo. 309; Sellers vs. People, 3 Scam. 412; State vs. Brown, 15 Kas. 400.

*J. L. Smith. Att'y Gen'l, for Respondent,* cited: State vs. Harlow, 21 Mo. 440; State vs. Sloan, 47 Mo. 604; State vs. Keene, 50 Mo. 357; Baldwin vs. State, 12 Mo. 223; McComas vs. Covenant Ins. Co., 56 Mo. 573; 3 Scam. 88; 2 Grat. 564; 7 Id. 619; 4 Blackf. 101; 3 Humph. 396; 5 Park. Crim. Rep. 644; Wagn. Stat. 1103, §§ 12, 13, 14; Dana vs.

Tucker, 4 Johns. 487; Lisle vs. State, 6 Mo. 428; State vs. Ross, 29 Mo. 51; Whart. Crim Law, 655, and note.

HENRY, Judge, delivered the opinion of the court.

At the November term, 1876, of the Hickory circuit court, defendant was indicted for the murder of Nathan Ghann, and on his application a change of venue was awarded to the circuit court of Webster county, in which he was tried and convicted of murder in the first degree, at the February term of said court, 1877.

The evidence all tended to show that the prisoner and Ghann met at the town of Elkton, in Hickory county, and that defendant and Ghann had a friendly scuffle, as it appeared to the witnesses, and immediately afterwards, went into a store house. Defendant then said he could throw Ghann in a wrestle. Ghann said he could not. Defendant said he could, and Ghann again said he could not. Defendant thereupon told Ghann that he was a "d—d liar." He repeated the expression, when Ghann said it was more than he could stand, and pulled off his coat, and he and defendant, who held a knife in his hand, were about to fight, when bystanders interfered and separated them. Defendant was taken out of the house, but stood in front of the door abusing and cursing Ghann, challenging him to fight him, and made an unsuccessful attempt to get into the house.

This occurred on the 23d day of October, 1876, about noon. Defendant, who resided but a few miles from Elkton, got on his horse, went home and procured a double barreled shot gun, and returned to Elkton the same afternoon, stating on the way, in the presence of several parties, that "Ghann goes to hell before sun down," or "I'll send him to hell before sundown," witnesses differing as to which expression he used. Arriving at Elkton he sought the deceased, and, without any provocation then given, shot and killed him. This occurred in the latter part of the afternoon. Defendant, after killing Ghann, told several persons, at several different times, that he shot Ghann for abusing him that day at Elkton. He made that statement to the sheriff, who arrested him that night.

One of the defendant's sons testified that he saw Ghann the morning of the day he was killed ; had a conversation with him, in which Ghann said he had "done her (my father's daughter) just as he had done McCracken's wife." There was evidence tending to show that Ghann had had criminal connection with Mrs. McCracken. Witness further stated, that, after Ghann was killed, he asked his father what he had killed him for, and he said he killed him for the way he had treated "Bug" (his daughter's nick name). Two other witnesses for the defense testified to improper liberties taken by Ghann, on one occasion, with Miss Taylor, a young girl about fifteen years of age, daughter of defendant, and that Ghann afterwards told them he could and would have illicit intercourse with her.

There was no evidence that Wm. Taylor, the son who testified that Ghann said to him he had done with Miss Taylor as he had with McCracken's wife, ever communicated that fact to his father ; but, on the contrary, he left home early that morning, and had no conversation with the old man until after Ghann was killed. Nor was there any evidence that the two McCrackens, who testified to the conduct of Ghann towards Taylor's daughter, ever informed Taylor, or any of his family, of that fact, or that Ghann had said he would seduce her.

Defense offered evidence of threats made by Ghann against Taylor, which was excluded by the court, as was also evidence to the effect that he had seduced women in Tennessee before coming to this State.

Defendant asked the court to instruct the jury on the subject of emotional insanity, which the court refused to do. It is unnecessary to copy the instruction. The evidence did not warrant the instruction asked, or any instruction on that subject.

There was no evidence of the seduction of the daughter, except that of William Taylor and the two McCrackens ; no evidence that the facts which they pretended to know were ever communicated to the defendant ; and stating why he had killed Ghann, to a half dozen or more persons, at different times, he gave as a reason that Ghann had abused him that day at Elkton ; and the only witness who says that he gave the seduction

of the daughter by Ghann as the reason for killing him, was his son William.

The court properly refused to admit evidence of threats made by Ghann against defendant. The evidence establishes beyond a doubt, that defendant sought Ghann and shot him at a time when Ghann was making no demonstration against him. It is not pretended that defendant, when he killed Ghann, was acting in self defense. Defendant was the aggressor in the difficulty in the forenoon, and when shot by defendant, Ghann was not only making no attempt to injure defendant, but was unarmed and endeavoring to escape from him.

The court also properly excluded the evidence offered to the effect that Ghann had seduced women in Tennessee. It would not have justified the husbands, fathers or brothers of the seduced women in Tennessee in taking his life, and certainly it was not for the defendant to avenge them by slaying the seducer.

Another question of more difficulty is presented by the motion for a new trial. David Smith, one of the panel of forty jurors summoned in the case, stated, on his examination on the *voir dire*, that he had not formed or expressed an opinion as to the guilt or innocence of the defendant. After the trial, in support of the motion to set aside the verdict, defendant produced and read to the court the affidavits of Samuel E. Cole, John. W. Rice and George M. Todd.

Cole swears, that at that term of the court at which defendant was tried, he heard Smith say that "there were so many cases coming here on change of venue that some of them ought to be strung up."

Rice swears, that a day or two before the jury was summoned in the Taylor case, he heard David Smith say; "I have heard something about the murder, or I have heard about it, and—damn Taylor! he ought to be hung," or words to that effect.

Geo. M. Todd swears, that "on Saturday the 24th, or Sunday the 25th, March, 1877, some men came along, and Smith asked who they were. I replied: They are from Hickory county, I believe. Smith then said: 'I understand there is a man to be tried here at this term from that county, for murder, and from

what I hear he ought to be hung, or will hang,' or words to that effect."

David Smith's counter-affidavit was read by the prosecution, in which he says: "The statement made by Rice is erroneous. I did not know the name of Taylor until I was sworn to answer questions. I might have made the remark that he would hang, and might have used the word 'D—n!' for I am in the habit of swearing, or might have said, speaking of the man from Hickory county, charged with murder, that 'from what I have heard, d—n him! he will hang,' for I was under the impression that I had heard some one, whose name I do not now remember, saying that the Hickory county murder case was a bad case; that the man (meaning defendant) would be hung; but whoever that person was, he was not a witness in the case, nor repeated to me, nor in my presence, any of the facts or circumstances of the murder or killing, nor did any one else, nor did I ever hear any part of the testimony, or any of the circumstances of the killing until I heard it from the witnesses, as a juror."

As to the statement of affiant Cole, Smith, in his affidavit, states that he thinks it substantially true and correct, but thinks the remarks testified to by Cole had reference to a man named Harb, against whom an indictment was pending in the Webster circuit court, on change of venue from Hickory county, and that he had not then heard of the Taylor case. He denied the remark attributed to him by the affiant Todd.

Whether, for the alleged cause, a new trial should have been granted, does not depend upon the competency or incompetency of Smith as a juror, on the facts disclosed by the affidavit. The statute, in trials for murder, requires a panel of forty jurors to be summoned, and allows the defendant a peremptory challenge of twenty. He has the right to know of each one of the forty if he has formed or expressed an opinion as to his guilt, and although one who, on rumor alone, has formed an opinion, is a competent juror, yet the defendant has a right to know whether he has, under any circumstances, formed an opinion, so as to make such challenges as will leave on the panel only those who are en-



tirely free from bias. The accused is entitled to a "public trial by an impartial jury of the county," and is not to be deprived of this constitutional right by the inadvertence or willful falsehood of those who are placed upon the panel to try him. The remarks attributed to the juror, Smith, showed that he was prejudiced against the defendant personally, and against all persons whose cases had been brought to Webster county on change of venue. Whether he had heard evidence or not, or formed an opinion or not, as to the guilt or innocence of defendant, such a state of mind and heart as would prompt him to curse the defendant, and declare, "that somebody from Hickory county ought to be strung up," are enough to show that a panel composed of that kind of material would be anything but an impartial jury. The juror, in his affidavit, does not positively deny the remarks attributed to him, while the affiants, on the other side, testify positively to his statements. The juror is not corroborated by any one, nor was any attempt made to show that affiants on the part of the defendant were unworthy of belief.

In the State vs. Burnside (37 Mo. 347) the remark attributed to the juror was, that he believed defendant guilty, and that he ought to be punished. The juror denied, on oath, that he had made the remark, and one working in the shop with him at the time of the alleged remark, testified that he did not hear it, and there were several affidavits proving the character of the juror for veracity and integrity to be good. This court held that a new trial should have been granted.

In the State vs. Wyatt (50 Mo. 309) the remark attributed to Whitaker, the juror, was, that he believed defendant guilty, and that he ought to be punished. Whitaker, in his affidavit, admitted it, but said he was thinking of a different case. This court held, in that case, that a new trial should have been granted.

The case at bar is a much stronger one for defendant. In the State vs. Wyatt, if the juror, in his affidavit, told the truth, the defendant could not have been prejudiced by the opinion he expressed or entertained; for while it was as to defendant's case by

title, it was a mistake, and the juror had in his mind a different case, and confounded names.

Conn vs. Hailstock (2 Grat. 564), and Com. vs. Curran (7 Grat. 619), hold a contrary doctrine. In Willis vs. People (5 Park. Crim. Cas. 621), the affiants did not give the language of the juror, but what they thought it imported, and Ingalls J., who delivered the opinion, says: "In this affidavit Layman merely adopts the statement of Jones and Houghtailing, and does not undertake to give the language used by Shaw, but merely his conclusion deduced therefrom." This criticism upon the affidavits seems justified, as Shaw expressly denies having made any such statement, or having expressed any such opinion as is attributed to him in these affidavits.

The joint affidavit of Jones and Houghtailing, referred to in the foregoing paragraph, stated that Shaw, the juror, "gave it as his opinion" that the said Willis ought to, and should suffer death for the killing of Mrs. Phelan.

In the case in 3 Scammon, 88, McGregg vs. State (4 Black. 101), and State vs. Brown (15 Kas. 400), referred to by the State, the questions arose on the examination of the jurors on their *voir dire*, and are not pertinent to the question we are considering. Sells vs. People (3 Scam. 413) sustains the former decisions of this court.

We are satisfied with the doctrine held in those cases, and consequently the judgment will be reversed and the cause remanded. The other judges concur.

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STATE OF MISSOURI, Respondent, vs. JESSE W. McBRIDE, Appellant.

1. *Criminal law—Dram shop license—Sale of liquor without—Act of 1874, taking effect June 1st.*—Under the act of March 20th, 1874 (Adj. Sess. Acts, 1874, p. 46), an indictment which charges defendant with selling liquor subsequent to June 1st, 1874, when said act went into effect, without a dram shop license, and which fails either generally or specially to negative the fact that defendant was authorized to sell as a druggist or otherwise, is bad. Contrawise,

where the indictment, although brought subsequent to June 1st, charges sales to have been so made prior thereto, the indictment would have been good, and proof of sales anterior to that date would be admissible.

*Appeal from Dade County Circuit Court.*

*J. F. Duckwall*, for Appellant, cited : 1 Whart. Am. Cr. Law, §§ 378, 379, 380, 614 ; State vs. Shifflett, 20 Mo. 415.

*J. L. Smith, Atty Gen'l*, for Respondent, cited : Austin vs. State, 10 Mo. 591 ; State vs. Fierline, 19 Mo. 380 ; State vs. Small, 31 Mo. 197.

HENRY, Judge, delivered the opinion of the court.

Defendant was indicted at the August term, 1874, of the Dade circuit court, for selling liquor without license. The indictment charged, substantially, that on the 5th day of August, 1874, the defendant, unlawfully and willfully, sold intoxicating liquor, in a quantity less than one gallon, to-wit : one pint of alcohol, without then and there having a dram shop keeper's license. The proof was, that defendant was a druggist, and that both prior and subsequent to the 1st day of June, 1874, and within a year next preceding the finding of the indictment, defendant had sold whisky in quantities less than one gallon.

The court, after hearing the evidence, excluded all that related to sales after the first day of June, 1874.

By an act entitled "an act supplementary to chapter 98 of the General Statutes, to regulate the sale of intoxicating liquors by dealers in drugs and medicines," which took effect June 1st, 1874, druggists were forbidden to give away or sell any intoxicating liquor, in any quantity less than one gallon, without taking out license as dram shop keepers, except for medicinal purposes, upon the written prescription or certificate of a regularly practicing physician of the county, that such liquor was to be used for medicinal purposes.

The indictment charges that defendant sold the intoxicating liquor without having a dram shop license, and his counsel contends that it should also have alleged, either specially or in general terms, that he had no other authority to sell, or that, being

a druggist, he sold liquor in less quantity than one gallon, without first having a written prescription or certificate, from a regular practicing physician of the county, that said liquor was to be used for medicinal purposes.

In the case of the State vs. Brown (8 Mo. 210) the defendant was indicted for selling spirituous liquors in less quantity than one quart, to be drank at the place of sale, without then and there having a dram shop license.

The court held, Napton, Judge, delivering the opinion, that as the act of 1835, to regulate inns and taverns, was in force when the indictment was found, and by that act innkeepers were authorized to vend liquors in quantities less than a quart, to be drank at the tavern stand, it was necessary, in an indictment for the offense of selling liquors in smaller quantities, to negative the existence both of an innkeeper's license and a dram shop license. He adds: "Either license would justify the selling, and if the charge be, as it was in the indictment, that the selling took place without one or the other license, a conviction and judgment under such an indictment would be no bar to a subsequent indictment for the same offense."

If the indictment in the case at bar had charged defendant with having sold liquor in a less quantity than a gallon, without being a dealer in drugs, no one would contend that it would have been a good indictment. The right of a druggist to sell under circumstances therein stated, is secured by the act of 1874, and its provisions amount to a license to a dealer in drugs to sell under the restrictions imposed by that statute, and we can see no difference in principle between the case of the State vs. Brown and this, and the reasoning of the court there would require the pleading in this case, either generally or specially, to negative the fact of defendant being a druggist.

The exclusion by the court of the evidence in relation to sales of liquor subsequent to the 1st day of June, 1874, does not obviate the difficulty. When the indictment was preferred the act of 1874 was in force, and the offense charged was alleged to have occurred on the 5th day of August, 1874. Ordinarily, the time at which the offense is charged to have been committed is not material, and

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proof of the sale of liquor at any time within one year, next preceding the finding of the indictment, is sufficient; but this, of course, presupposes that the indictment is sufficient. The circumstances here, however, make the time alleged in the indictment material. If the offense had been charged on any given day prior to the 1st day of June, 1874, it would have been immaterial, and the evidence would have been admissible to prove a sale of liquors at any time before the 1st day of June, and within a year next before the finding of indictment, but having charged it to have been on the 5th day of August, the pleader should have stated all the facts *then* necessary to make a case against the accused.

The evidence shows that defendant was a druggist, and if he had been indicted, as such, it would have been necessary to allege in the indictment that he sold the liquor without having a written prescription or certificate, of a regularly practicing physician of the county, that it was to be used for medicinal purposes. The usual allegation in indictments for selling liquor without license, is, that defendant had not "a dram shop license, or any other authority to sell intoxicating liquors, etc." It is well settled that the negation of the fact that the accused had a license or authority to sell, may be in general terms, and that in this case the pleader abandoned a form which has so often been held sufficient by this court, is singular.

The judgment is reversed and the cause remanded. The other judges concur.

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STATE OF MISSOURI, Respondent, *vs.* JAMES F. BROWN, Appellant.

1. *Practice, criminal—Indictment—Pleas in abatement—What insufficient.*—Pleas in abatement to an indictment on the grounds that one of the grand jurors returning the same was not a freeholder or householder of the county; that he was not selected as a grand juror by the county court, and that defendant was not present when that jury was sworn so as to challenge said juror or the array, are bad on demurrer.

2. *Indictment for murder—Exclamation after killing that deceased had a knife not res gesta.*—On an indictment for murder, the testimony that witness heard a little girl, after the killing, exclaim "Mr. L. (meaning the deceased) had a knife in his hand," was held inadmissible. Such exclamation is no part of the *res gesta*.
3. *Homicide, trial of—Jury—Proof that they were on site of casualty—Effect of.*—Proof of the fact that on trial of an indictment for homicide, the jury were on the ground where the killing took place, where it did not appear that they were looking at the ground with a view to understanding how the deed was done, nor that they said anything about it or conversed among themselves about the ground, and there was no question as to the locality of the homicide, or that the witness testifying thereto was in a position to see what he related, will not authorize a new trial.
4. *Evidence—Falsus in uno, etc.*—An instruction which tells a jury that they may disregard the testimony of a witness who has testified falsely in any particular, without describing such testimony as wilfully or intentionally false, is improper; but the giving of such instruction will not operate a reversal, where it does not appear to have wrought injury to the appellant.
5. *Criminal law—Murder—Self defense—Doctrine of, when may be invoked.*—When defendant, in an indictment for homicide, brings on or voluntarily enters into a difficulty which results in the death of his antagonist, however high the passion of defendant or however imminent the danger to him may have become during the difficulty or conflict, the plea of self defense cannot be invoked.
6. *Criminal law—Provocation and danger not sufficient to reduce murder to lower mode of crime.*—No provocation short of personal violence, nor any peril not apparent and imminent, will be sufficient to reduce the crime of murder to a lower order of homicide.
7. *Homicide—Threats to kill prisoner—Presumption of continuance of purpose, etc.*—The fact that the deceased threatened to kill the prisoner, or to do him great bodily harm, does not raise the presumption of law that the purpose continued down to the time of the killing, and that deceased was present at the time for the purpose of carrying out such threat.
8. *Indictment—Homicide—Want of provocation—Burden of proof.*—In an indictment for murder, the burden of proof is not upon the State to show that the prisoner killed the deceased without any justifiable or legal excuse or extenuating circumstances.

*Appeal from Taney County Circuit Court.*

*John O'Day*, for Appellant, cited: *Eastwood vs. People*, 3 Park. Crim. Rep. pp. 25-58, and cases cited; *Watson vs. People*, 4 Id. pp. 619-50; *Wagn. Stat.* 447, §§ 13, 18; *State vs. Matthews*, 20 Mo. 55; *Coleman vs. Roberts*, 1 Mo. 97; *Fugate vs. Carter*, 6 Mo. 267, 279; *Hickey vs. Ryan*, 15 Mo. 62.



*J. L. Smith, Att'y Gen'l.*, for Respondent, cited: Wagn. Stat. 1081, § 2; State vs. Bleckly, 18 Mo. 428; State vs. Welch, 33 Mo. 33; State vs. Cornell, 49 Mo. 282; Fanny vs. State, 6 Mo. 122; Wood vs. Hicks, 36 Mo. 326; Langsdorf vs. Field, 36 Mo. 440; State vs. Starr, 38 Mo. and cases cited; State vs. Linney, 52 Mo. 40; State vs. Underwood, 57 Mo. 40; State vs. Hayes, 23 Mo. 287; State vs. Holme, 54 Mo. 153; State vs. Koss, 29 Mo. 32; Franz vs. Hilterbrand, 45 Mo. 121; State vs. Harris, 59 Mo. 550.

HENRY, Judge, delivered the opinion of the court.

At the March term, 1874, of the Taney circuit court, defendant was indicted for the murder of Joseph Long. At an adjourned term of said court in December following, he filed his petition asking to be furnished with a copy of the indictment against him, and objecting to his arraignment until he should have been served with such copy, but it appearing to the court that he had previously been duly served and furnished with a copy of said indictment, his application was refused. The court heard testimony, and the evidence preserved in the bill of exceptions we think fully sustains the finding of the court. The cause, on defendant's application, was continued to the March term, 1875, at which he filed two several pleas in abatement; the first, alleging, substantially, that Joseph Glenn, one of the eighteen persons who composed the grand jury that returned the indictment against him, was not a freeholder or householder of Taney county, and that he had not been selected as a grand juror by the county court of said county, and that when said jury was sworn defendant was in Green county, in the custody of the sheriff of said county, and had no opportunity to challenge said juror, or the array.

The second plea was, in substance, that the record failed to show that the county court of Taney county selected the grand jurors, or either of them, and alleged that five of the eighteen were not selected by said court, and five others selected were not sworn on the jury, or discharged by the court.

There was a demurrer to each of these pleas, sustained by the court, and it is sufficient on that subject to say, that all the questions raised by the demurrers are settled by the cases of the State vs. Welch (33 Mo. 33); State vs. Blakey (18 Mo. 428), and State vs. Connell (49 Mo. 282), which fully sustain the action of the court.

There was then a trial of the cause, which resulted in a conviction of defendant of manslaughter in the second degree; and his punishment was assessed at three years' imprisonment in the penitentiary.

Motions for a new trial and in arrest of judgment were overruled, and defendant has prosecuted his appeal to this court.

The record is voluminous and portions of it are several times unnecessarily repeated, and there is a considerable portion of it that might have been entirely omitted, without prejudice to either party.

The evidence was somewhat contradictory, but was to the effect that defendant was engaged to be married to Miss Maddershott, who had lived in the family of deceased; that deceased was opposed to the match, and had threatened defendant's life if he married the young lady; that the 31st day of December, 1873, was appointed for the marriage, and on the evening of that day, at the residence of Jasper J. Brown, where the ceremony was to take place, there were several persons besides said Jasper Brown, uncle of defendant, defendant's mother, Miss Maddershott, and defendant; that deceased came to the house, and without any ceremony walked in, when he and defendant immediately commenced quarreling. The "lie!" and "d—d lie!" passed between them, and Jasper Brown ordered them both out of the house, and succeeded in getting them out. Deceased then started to go home, and as he walked towards the gate opening out of Jasper Brown's yard, the quarrel was renewed, and about the time deceased reached the gate defendant called him "a d—d liar." He then called defendant "a d—d liar" and turned and approached defendant, and when within a few feet of him, defendant drew a pistol and shot him.

There was testimony to the effect, that deceased was in the habit of carrying a dirk knife, but no weapon was found upon his person, and the evidence is conclusive, that when killed he was unarmed, except with a barlow knife unopened in his pocket.

After he had killed deceased, defendant went into the kitchen and Miss Maddershott asked him why he had killed Long, and, according to one witness, he replied that "no man could call me [him] a d—d liar and live." Miss Maddershott testified that his reply to her inquiry was "no man shall call me a d—d liar, and come rushing on me with a knife, as Long did." There was conflicting testimony as to the manner in which Long approached defendant from the gate. Some of the witnesses think he had his right hand raised, others are positive he had not. Some testified that defendant renewed the quarrel in the yard, others that he did not. The defense offered to prove by Mrs. Malinda Brown, mother of defendant, that immediately after the shooting, while defendant was present, and Long was lying where he had fallen, a little girl nine years of age, then and there exclaimed that "Mr. Long had a knife in his hand." The State objected and the court sustained the objection, and in this it is contended that the court erred.

We think otherwise. It was no part of the *res gestæ*. It was after Long was killed. If the exclamation had been made while Long was approaching, and before the fatal shot was fired, it would not perhaps have been hearsay, but a circumstance to be considered by the jury in determining whether defendant was acting under an apprehension that deceased was about to assail him with a deadly weapon. After the fight was over the exclamation could not be a part of the *res gestæ*, and the child could have testified as to what she saw. The court did not err in excluding the testimony.

One of the grounds relied upon in the motion for a new trial was misconduct of the jury in visiting and viewing the ground where the fight occurred, in the absence of defendant, and without his knowledge or consent, and without leave of the court. Affidavits were read in support of this motion. The facts proven by those affidavits are, that the jury during the trial of the cause

boarded at the house of J. J. Brown; that they were seen on and looking at the ground where Long was killed, but witnesses could not state that they were looking at the ground with a view of understanding how the killing was done, nor was it shown that they said anything about it, or that they conversed among themselves in regard to the ground.

The case of *Martin Eastwood vs. People*, (3 Park. Crim. Rep. 215.) is relied upon as an authority for the position that such conduct on the part of the jury entitled defendant to a new trial. In that case, the jury were permitted by the officer in charge of them to separate and converse with persons in the street. After the testimony was closed, before the case was summed up, six or eight of the jurors went and examined the ground where the blow which killed the deceased was given, about two miles from the court house. They went to the residence of one Hansford, and Hobbie—one of the jurors—opened the gate, stepped into the yard and placed himself upon the spot where Hansford's daughter had testified, on the trial, that she stood when she saw the defendant strike the deceased; and then turning his head and looking toward the place where the deceased fell, Hobbie remarked that "Miss Hansford had a good view from that point, and could see all that occurred." The mere recital of the facts in that case, is sufficient to show the striking difference between that and the case at bar.

The juror, Hoppie, testified to his associates, as to a material fact. Standing where Miss Hansford swore she stood, he said to the others, "Miss Hansford had a good view from this point and could see all that occurred." No court could for a moment hesitate to set aside a verdict on such a state of facts, in a criminal case; but in the case at bar there is not the slightest evidence of misconduct on the part of the jury. If, on such grounds as are here relied upon, a verdict must be set aside, then, when the offense is charged to have been committed at a county seat, generally a small village, over the whole extent of which one has a view from the court house window, and in which not unfrequently, the crimes for which persons are prosecuted are committed, the jury would have to be consigned to a dungeon to consider of their

verdict, lest they might accidentally see some locality mentioned in the testimony. The place where the killing occurred in this case was not in doubt. There was no conflict of evidence on that subject, no question whether any witness who testified was in a position to see what he related, and no possibility that defendant could have been prejudiced by the conduct of the jury.

The jury were boarding with defendant's uncle, and it is to be supposed that the inmates of that house were not unfriendly to the accused, or that that house was much frequented by his enemies.

His uncle was a witness, called by defendant, and we take it not unfriendly to him. To set aside a verdict on such grounds as are here presented would be trifling with justice.

The court, for the State, gave eight instructions. The first one defined murder in the first degree; the second, murder in the second degree. The third defined the meaning of the words "wilfully," "deliberately," "premeditatedly," and "malice."

These instructions were substantially such as have been repeatedly held good by this court.

The fourth defined manslaughter in the second degree, and is faultless. The fifth told the jury that if they found from the evidence that defendant and Joseph Long had a difficulty, which resulted in the death of said Long, and that defendant commenced, or brought on the difficulty, by any wilful or unlawful act of his, or that defendant, voluntarily, and of his own free will and inclination, entered into the difficulty, then there was no self defense in the case, and the jury should not acquit on that ground, however high the passion of defendant may have become, or however imminent, or near, the danger to defendant may have been during said difficulty or conflict.

The sixth instruction declared that no word of reproach or abuse, however grievous, nor any indecent or provoking act however calculated to excite indignation or anger, are sufficient to reduce the crime of killing to a lower degree than murder, and that the provocation must consist of personal violence, or that the danger of such must be apparent and imminent.

The eighth was the usual instruction in regard to reasonable doubt and is not complained of.

The seventh instruction was faulty and is as follows: "The court instructs the jury that they are the sole judges of the credibility of the witnesses, and if they believe that any witness has testified falsely in relation to any material matter, they are at liberty to disregard all or any part of such witness' testimony."

It is not a correct statement of the law. A jury is not warranted in disregarding the testimony of a witness who has testified falsely unintentionally. The seventh instruction should have been so qualified. But has the defendant been injured by it? In examining the whole record, it is somewhat difficult to perceive any ground for giving any instruction on that subject.

Witnesses differed, it is true, in their accounts of the difficulty, but the differences were only such as are frequently observed in the account given by eye witnesses of rencounters which are of a character to excite and alarm spectators. That they do not agree in their testimony in relation to it, is not often to be attributed to mendacity, but to the fact that one witnessed it from one point and another from a different point, that some were more excited than others, and none perhaps so cool as to tell all they saw, just as they saw it.

The testimony of the witnesses for the defense, was not such as in our judgment to authorize an instruction on that subject; but the jury, if governed by it, would have found as much in the evidence for the State to which it was applicable as in that for the defense. We think it was a harmless instruction in this case, while there are cases in which it would be fatal to a verdict.

The fifth and sixth instructions correctly stated the law. (State vs. Starr, 38 Mo. 270; State vs. Holme, 54 Mo. 153; State vs. Underwood, 57 Mo. 40.)

The defendant asked twenty-one instructions, eighteen of which were given. The three refused instructions were as follows, substantially: Number fourteen asked the court to declare that "if defendant shot and killed Long in a heat of passion, produced by an assault Long was making on him by advancing on de-



defendant to beat him, and that in the excitement and fear, after he had retreated to the house, he shot and killed Long to prevent Long from inflicting personal injury on him, there not being reasonable cause for defendant to apprehend that Long intended to kill him, or do him great bodily harm, then defendant would be guilty of manslaughter in the fourth degree. Manslaughter in the fourth degree is the involuntary killing of another by weapon or by means neither cruel nor unusual, in the heat of passion, in any cases other than justifiable homicide." (Wagn. Stat. 447, § 17.) The substance of the refused instruction is, that, if defendant, in a passion, intentionally killed the deceased, because deceased was advancing on him, although defendant had no reason to apprehend that Long intended to kill him, or do him great bodily harm, it was an involuntary killing. Stripped of its verbage, its absurdity will at once be seen.

The seventeenth instruction, asked by defendant and refused, asked the court to declare to the jury, that when it was once shown that Long threatened to kill defendant, or to do him great bodily harm, the presumption of law is that such intention of Long continued down to, and including the time of, the killing, and that Long was present at J. J. Brown's for the purpose of carrying into execution such previous threats. There is no such presumption of law. The jury were to determine from what occurred between the parties, whether deceased was there for the purpose of putting his threats into execution or not.

The twentieth instruction asked by defendant and refused was, "that the burden of proof was on the State to prove a case against defendant, not only that he killed Long, but that he did so without any justifiable or legal excuse, or extenuating circumstances." The court did not err in refusing that instruction. (State vs. Hays, 23 Mo. 287; State vs. Underwood, 57 Mo. 40.)

The eight instructions given for the State, and the eighteen given at the instance of defendant, presented the case to the jury more favorably for him than defendant had any right to ask. The jury treated him with remarkable leniency, and he has no reason to complain either of the action of the court or the jury.

Judgment affirmed, all the judges concur, except Judge Sherwood, absent.

State v. Jeffors.

STATE OF MISSOURI, Defendant in Error, vs. WILSON J. JEFFORS,  
Plaintiff in Error.

1. *Practice, crim.*—*Entries nunc pro tunc*—*On what foundation may be made.*—Where a clerk omits to make an entry which was ordered to be made, or makes a different entry from that which was ordered, the court may at a subsequent term amend the record so as to make it conform to the truth; provided some entry either in the minutes kept by the judge or clerk, or some paper filed in the cause sustaining them shows facts from which the amendment can be made. It cannot be so amended by evidence *aliunde*, nor by facts in the breast of the judge.
2. *Practice, crim.*—*Amendment of entries nunc pro tunc at subsequent term*—*When improper*—*Autrefois acquit, etc.*—*Discharge of jury by operation of law, effect of.*—On the trial of an indictment for a felony, where the case is submitted to the jury, and the only entry in the record showing what became of the jury is that "after hearing the allegations, proof and pleadings as well on behalf of the State as on the part of defendant they retired to consider of their verdict," and no record is made on the judge's docket or clerk's minutes in regard to the discharge of the jury or the continuance of the cause, the court cannot, at a subsequent term and on an affidavit of the clerk, direct the entry of a *nunc pro tunc* order showing the discharge of the jury. But such state of the record will not authorize the discharge of the prisoner on motion, at a subsequent term, nor bar his subsequent trial for the same offense. For his life was not thereby judicially put in jeopardy, nor do such entries on the record raise the legal presumption of an acquittal. (See Const. Bill of Rights, § 23.) And the discharge of the jury either where the term expired by limitation or *ex vi termini* by the commencement of another term will not bar a re-trial.
3. *Jury*—*Discharge of in cases of felony*—*Power of court should be exercised, how.*—The power of a court to discharge a jury in cases of felony should be exercised with great caution.

*Error to Osage County Circuit Court.*

*Lay & Belch*, for Plaintiff in Error, cited: *Hide vs. Curling*, 10 Mo. 359; *Gibson vs. Chouteau's heirs*, 45 Mo. 171; *Morrison, Adm'r, vs. Dassman*, 3 Cal. 255; *Moody vs. Grant*, 41 Miss. 565; *West vs. Galloway*, 33 Ala. 306; *Davis vs. Ballard*, 7 Mon. 604; *Bondurant vs. Thompson*, 15 Ala. 202; *Kitchen vs. Moye*, 17 Ala. 143; *Comm. vs. Lester*, 17 Serg. & R. 164; 17 Mo. 541; 48 Cal. 323; *Cool. Const. Lim.* 525, 526; 26 Ala. 155; 1 Stark. Cr. P. 262; 1 Ch. Cr. Law, 723; 1 Arch. Cr. Pr. & E., 186; 10 Yerg. 542; 23 Wend. 47.

*J. L. Smith, Att'y Gen'l*, for Defendant in Error, cited: Const. : Art. II, § 23; *State vs. Clark*, 18 Mo. 432; *Whart. Crim*

Law, §§ 580-586 ; State vs. Matrassey, 47 Mo. 295 ; Wagn. Stat. 422, § 30.

NORTON, Judge, delivered the opinion of the court.

Defendant was indicted by the grand jury of Osage County for murder in the first degree, for shooting and killing one Ambrose Spencer in April, 1876. At the adjourned April term of the Circuit Court of said county held in June, defendant having been duly arraigned, and having pleaded "not guilty," the trial of the cause by a jury was commenced on the 17th day of June and continued from day to day till the 22nd of June, when it was finally submitted to the jury, the record showing that on that day they retired to consider of their verdict. At the October Term, 1876, of said court, the defendant filed his motion, asking the court to dismiss the cause and discharge him ; "because the records of the court show that at the April Term, 1876, said defendant was duly arraigned and tried before a qualified jury ; that said jury was not discharged by any order of said court, or by and with the consent of the defendant."

A motion was also filed on the part of the State asking the court to make an order requiring the clerk to amend the record and enter an order *nunc pro tunc*, showing that the jury had been discharged, being unable to agree upon a verdict, and the continuance of the cause.

The motion filed by the State was sustained and the motion of defendant was overruled, to which action of the court defendant excepted. The cause was then tried by a jury, resulting in the conviction of defendant for murder in the second degree, and the assessment of his punishment at imprisonment in the penitentiary for twelve years. A motion for new trial having been overruled, the cause is brought to this court on appeal.

The defendant seeks a reversal of the judgment on the grounds that the court erred in sustaining the motion on the part of the State, and directing the entry of a *nunc pro tunc* order showing the discharge of the jury at the April adjourned term of said court, and in overruling the motion of defendant for the dismissal of the cause and the discharge of defendant.

The only evidence offered in support of the motion for correcting and perfecting the record was the affidavit of the clerk of the court and prosecuting attorney, in which they state that the next day after the jury had retired to consider of their verdict, they came into court, and in the presence of the accused and his counsel, announced that they were unable to make a verdict, and thereupon they were discharged by the court and the cause was continued and defendant remanded to jail—all which the clerk omitted to record.

It does not appear that any entry of record was made, showing what became of the jury, other than the one which states "that after hearing the allegations, proof and pleadings as well on behalf of the State as on the part of defendant, they retired to consider of their verdict.

No entry appears to have been made either on the docket or calendar of the judge, or in the minute book of the clerk, in regard to the discharge of the jury, or the continuance of the cause.

When a clerk omits to make an entry which was ordered to be made, or makes a different entry from that which was ordered, the court may, at a subsequent term, amend the record so as to make it conform to the truth, provided some entry either in the minutes kept by the judge or clerk, or some paper filed in the cause and sustaining them, show the facts from which the amendment can be made. (Dunn vs. Raley, 58 Mo. 134.)

The power possessed by courts to make *nunc pro tunc* entries in a cause, after the end of a term, does not authorize the entry of an order which ought to have been made, but only those which were actually made, the evidence of which is preserved by some minute made at the time. Evidence *aliunde* cannot be resorted to for such purpose. To allow such entries to be made on facts resting in the mere memory of witnesses, and their statements as to what occurred, would be to establish a rule which would breed the utmost confusion and uncertainty, and make courts of record everything except what the law intends them to be. Neither can such entry be made after the end of the term upon the knowledge of the judge him-

self. During the term, which is in legal estimation but one day, everything is in *feri*, and during that time the judge, of his own knowledge, may enter any judgment which has been pronounced. (Harrison vs. State, 10 Yerg. 542.) Inasmuch as the record was attempted to be amended upon the statement of witnesses and the knowledge of the judge, after the end of the term, the motion of plaintiff for a *nunc pro tunc* entry ought to have been overruled.

While this motion should have been overruled, it does not follow that the motion of defendant for his discharge should have been sustained. It is argued here that as defendant had once been put upon his trial, and as the jury to which his case had been committed had, after hearing the evidence and argument, retired by leave of court to consider of their verdict, and as the record is silent in regard to the disposition made of the jury and the case, the defendant is therefore entitled to his discharge upon the ground that he had thus once been put in jeopardy.

This question is not free from difficulty, and the effect of the discharge of a jury by the court because of their inability to agree upon a verdict, or of failure to discharge them at all, has given rise to considerable conflict of opinion, and in some of the States it has been held to be a bar to a second trial and to entitle the accused to his discharge; while in others, quite as numerous and respectable, a different conclusion has been reached. While it has been decided in Pennsylvania, Virginia, North Carolina, Tennessee, Indiana and California that the discharge of the jury in a criminal case except by defendant's consent, and in cases of such violent necessity as may be considered the act of God, will bar another trial, it has been otherwise held by the Supreme Court of the United States and the courts of Massachusetts, New York, Illinois, Kentucky and Mississippi, which have decided that the discharge of a jury by the court in the exercise of a sound discretion does not operate as a bar to a second trial. (1 Whart. Crim. Law, 573-590.) The conflicting views expressed by these various courts we will not undertake to reconcile, being disposed to adopt the views expressed in 2 Sto. on the Con. § 1787, p.

546, as in consonance with sound reason, judicial interpretation, and our own constitution.

It is there said "that no person shall be subject for the same offense to be twice put in jeopardy of life and limb."

The meaning of it is, that a party shall not be tried a second time for the same offense, after he has been once convicted or acquitted of the offense charged by the verdict of a jury, and judgment passed thereon for or against him.

But it does not mean that he shall not be tried for the offense a second time if the jury have been discharged without giving any verdict, or if having given a verdict, judgment has been arrested upon it, or a new trial has been granted in his favor; for in such case his life or limb cannot be judicially said to have been put in jeopardy.

The above meaning of the clause "no person shall be twice put in jeopardy" has been virtually embraced in the 23rd section of the bill of rights in our own constitution, which declares; "that no person shall be compelled to testify against himself in a criminal cause, nor shall any person after having been once acquitted by a jury, be again, for the same offense, put in jeopardy of life or liberty; but if the jury to which the question of his guilt or innocence is submitted, fail to render a verdict, the court, before which the trial is had, may, in its discretion, discharge the jury, and commit or bail the prisoner for trial at the next term of the court, or if the state of the business will permit at the same term; and if judgment be arrested after a verdict of guilty on a defective indictment, or if judgment be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law."

Under this section of the constitution, if the record in this case had shown the discharge of the jury because of their inability to make a verdict, it would not be pretended for a moment that this would entitle the defendant to his discharge in the face of the constitutional provision, which declares, that nothing short of a verdict of acquittal shall prevent a second trial.



This provision of the constitution was in part intended to change, and did in fact change, the rule at common law which authorized the court to confine the jury under strict charge of a bailiff, to be fed on bread and water till the end of a term, unless a verdict was sooner returned; and if a verdict was not then returned, to transport them around the circuit in a cart till they did agree upon a verdict. Strict as this rule was, it was, nevertheless, within the power of the court to discharge a jury without prejudice to the crown or commonwealth, for causes which could not be foreseen nor guarded against, such as the sudden death of a juror during the progress of the trial. The provision above quoted, declares in plain terms that nothing short of an acquittal by a jury shall prevent a second trial. This being its obvious meaning, we do not see how the trial court could have done otherwise than overrule the motion for the discharge of the defendant, as his right to a discharge, if force be given to the constitution, depended upon his acquittal by a jury—which the record in the case does not show. But it is argued that as the record only shows that the jury retired to consider of their verdict, and no further notice is taken of them, this is in legal contemplation an acquittal.

We do not think that this follows. It cannot certainly amount to an acquittal by the jury, for an acquittal by them can only be evidenced by their verdict, and the record before us shows no such verdict, but only that they retired to consider of their verdict. After a jury retires for this purpose, there are three ways in which they might lawfully be discharged. First, by returning into court a verdict for conviction or acquittal; second, by being discharged by an order of court because of their inability to agree upon a verdict, or by consent of defendant or some unavoidable cause, such as the sudden death of a juror; and third, by the expiration of the term of the court in which the trial is pending.

The jury in the case at bar was not discharged either in the first or second of the specified ways. Were they discharged by the expiration of the term of the court in which the trial was pending, and if so, what was the effect of such dis-

charge? In determining this question, judicial notice will be taken of the law establishing circuits, and of the times for holding courts in them. Osage County, in which this trial was had, is in the ninth judicial circuit, which comprises the counties of Maries, Osage, Gasconade and Franklin. (Wagn. Stat., 431, § 14.) The times prescribed for holding courts in these counties is as follows: in Maries, on the second Mondays in April and October; in Osage, on the third Mondays in April and October; in Gasconade, the second Mondays after the third Mondays in April and October; and in Franklin, on the fourth Mondays after the third Mondays in April and October.

It was legitimate for the Circuit Court of Osage County to adjourn the April Term of that court till June—a period beyond the times prescribed for holding the courts in Gasconade and Franklin—but the April Term could not be adjourned to a time beyond the third Monday in October, when by the law another term was to begin. Under any view which can be taken, when the October Term began the April Term ended *ex vi terminis legis*. It can make no difference whether the end of the April adjourned term, held in June, was brought about either by an order of the court adjourning it, after the business of the term was through with, or by operation of law when the April Term was dissolved and lost in the October Term. In either case, the jury would be discharged from the bestowment of any further consideration of their verdict. It is said in 1 Whart. Crim. Law, (590, § 588,) “that the statutory close of a term of a court has been held to justify a discharge of a jury, which is no bar to a subsequent trial except in North Carolina.” In the case of Williams vs. The Commonwealth, (2 Grat. 568,) where it was adjudged that the discharge of a jury by the court, after they had been out considering their verdict for two days, “because there was no possibility of their rendering a verdict during the term,” entitled defendant to his discharge, it was observed even then by the court “that it was the practice in Virginia in the case of a hung jury in a trial for a felony either to adjourn the court at the end of the term, taking no notice of the jury—in which case they are necessarily discharged by operation of law—or else to

call the jury in and discharge them simultaneously with the final adjournment of the court, and this practice was approved."

The only reasons assigned in the motion for defendant's discharge were that the jury in the first trial had, was not discharged by any order of court, or by consent of defendant. This might be true; yet if they were discharged by operation of law without any formal order of the court, such discharge would not operate as a bar to another trial. That they were thus discharged, we have already shown, and it therefore follows that the action of the court in overruling the motion was rightful.

We express no opinion as to the effect of an arbitrary unwarranted discharge of a jury in a case of felony.

The power to discharge for certain causes undoubtedly exists; but it should be exercised with great caution, as the citizen whose life or liberty is given to the hands of a jury is entitled to fair consideration by them, of which he should not be deprived by the arbitrary action of the court.

Judgment affirmed, the other judges concurring except Sherwood, Chief Justice, absent.

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THE STATE OF MISSOURI, Appellant, vs. HENRY C. SIDES, Respondent.

1. *Murder—Indictment—Allegations as to time and place of death—Defects in, what will authorize quashing of writ—Jeofails, statute of.*—An indictment for murder which charges that " \* \* of said mortal wounds said A. did immediately languish, and languishing did die," is defective in not specifically alleging when and how long after the wounding the death occurred. The defect is not cured by the statute of jeofails, and will authorize the quashing of the indictment.

*Appeal from McDonald County Circuit Court.*

J. L. Smith, Att'y Gen'l, for Appellant.

It is not necessary in an indictment for murder to charge in what county the deceased died, or when he died. The words of the indictment are susceptible of no other construction than that Martin died in the county of McDonald, and on the day before

alleged in said indictment, to-wit: the 3rd day of February, 1873. (State vs. Harvey, 67 N. C. 467; State vs. Ryan, 13 Minn. 370.)

*Bray & Cravens*, for Respondent, cited: Chit. Cr. Law, 737; 2 Hale, 179; Cro. Eliz. 738.

NORTON, Judge, delivered the opinion of the court.

The defendant in this case was indicted in the McDonald Circuit Court, at its February term, 1873, for murder, in killing one John Martin.

After various continuances of the cause, at the instance of defendant and on his motion and affidavit, a change of venue was awarded by the said circuit court, at its October term, 1874, to the circuit court of Newton county. Defendant filed in the latter court, at its February term, 1875, his motion to quash the indictment, which was sustained, and the defendant discharged. From this action of the court the State has appealed.

The causes assigned in the motion to quash are: 1st, because the record of the court does not show that the court appointed a foreman of the grand jury, or that there was any foreman of said grand jury; 2d, because the record does not show that there was the requisite number of men qualified to serve as grand jurors, when the indictment was filed in court; 3d, because the record does not show that said indictment was presented by the foreman in open court, in the presence of the grand jury; 4th, because the record does not show that Elijah Walker was qualified to serve as grand juror for McDonald county; 5th, because the indictment does not charge in what county or at what time John Martin died; 6th, because the record does not show the grand jurors were sworn as required by law.

We will only notice the fifth reason, assigned in the motion to quash the indictment, as all the other reasons assigned are not only extremely technical, but are unsustained by the record, which sufficiently shows that a foreman of the grand jury was appointed and sworn, together with fourteen other "good and lawful men," and that the indictment in question was returned in

open court, duly indorsed by the foreman in the presence of his fellow jurors.

The indictment charges in substance, that "defendant with force and arms, at, etc., on, etc., did then and there feloniously, willfully, deliberately and premeditatedly, on purpose and of his malice aforethought, make an assault upon the body of one John Martin with a certain pistol loaded, etc., which said pistol, etc., the said defendant Sides shot off and discharged upon the body of said John Martin, etc., inflicting one mortal wound, etc., of which said mortal wound the said John Martin did immediately languish, and languishing did die."

The indictment is defective in not alleging the time of the death of Martin. To make the offense of murder in the first degree it is necessary to prove the death, and that deceased literally died within a year and a day after he received the injury. (1 Haw. ch. 23, § 90; Lester vs. State, 9 Mo. 666; 2 Chit. Cr. Law, 737; Cro. Eliz. 738; 2 Hale, 179.)

In the case of the State vs. Lester, *supra*, the indictment charged that defendant "did inflict divers mortal bruises and contusions on the head of one Scott, of which he, the said Scott, did instantly die." Lester was convicted under the indictment, and this court reversed the judgment of the circuit court overruling a motion in arrest of judgment, on the ground that the indictment failed to allege either the time or place of the death.

In the case at bar the indictment only charges that the deceased "did immediately languish and languishing did die." The allegation fails to show when and where he died.

In a pleading which undertakes to charge the high crime of murder it is always best to follow precedents which have been long adhered to, and which have received the sanction of the highest courts both of this country and England. It is hazardous to make experiments in departing from them, under the impression that our statute of jeofails will cure an omission to state material facts.

The judgment is affirmed with the concurrence of the other judges, except Sherwood, Chief Justice, absent.

STATE OF MISSOURI, Plaintiff in Error, vs. AUGUST SCHIENEMAN, Defendant in Error.

1. *Criminal law—Indictment for disturbing worship on a public square insufficient, when.*—Where an indictment set out that defendant by indecent behavior and profane discourse, and by attempting to drive a horse and wagon through them, did disturb a congregation "met for religious worship at the southeast corner of the public square, in the city of Hannibal," it was held that under the statute (Wagn. Stat. 504, § 30,) that act was intended to protect camp meetings held on a piece of ground set apart for that purpose, and assemblages gathered within a house or place of worship, and not public squares and streets. If a portion of a public square were a place of public worship, that fact should be made distinctly to appear in the indictment.

*Error to Hannibal Court of Common Pleas.*

*J. L. Smith, Att'y Gen'l, with Carstarphen & Wilson*, for Plaintiff in Error, cited: Wagn. Stat. 504, § 30; Vaughn vs. State, 4 Mo. 530; State vs. Ross, 25 Mo. 426; Com. vs. Welch, 1 Gray, 324-7; State vs. Coulter, 46 Mo. 564; State vs. Swadley, 15 Mo. 515.

*Hatch & Hatch*, for Defendant in Error, cited: State vs. Bankhead, 25 Mo. 558; State vs. Mitchell, 25 Mo. 420; State vs. Hopper, 27 Mo. 599; State vs. Edwards, 32 Mo. 549; State vs. Stubblefield, 32 Mo. 563; State vs. Jasper, 4 Dev. [N. C.] 323; Whart. Prec. [2 Ed.] § 861; Bell vs. Graham, 1 Nott & McC. [S. C.] 278.

NORTON, Judge, delivered the opinion of the court.

The defendant was indicted in the Hannibal court of common pleas for disturbing religious worship. On motion of defendant the indictment was quashed, and to review this action of the court the case is brought here by the State on a writ of error. The indictment alleges that "defendant at," etc., "a congregation and assembly of people, then and there being met for religious worship, at the southeast corner of the public square in the city of Hannibal, then and there, unlawfully," etc., "did disquiet and disturb the congregation and assembly of people then and there met for religious worship, by rude and indecent behavior, and by profane discourse, and by attempting to drive a horse



fastened to a wagon, which said horse he was then and there driving, against, into and through the said congregation and assembly of people, met for religious worship, at and near the southeast corner of the public square and place of worship," etc.

The section of the statute which creates the offense with which defendant is attempted to be charged is as follows: "Every person who shall wilfully," etc., "disquiet or disturb any camp-meeting, congregation or other assembly of people met for religious worship, by making a noise or by rude and indecent behavior or profane discourse, within the place of worship, or so near to the same as to disturb the order or solemnity of the meeting, or menace, threaten or assault any person there being, shall be deemed guilty of a misdemeanor," etc.

We think that the evident purpose of the legislature was to protect from disturbance, first, camp-meetings, which are usually if not always held in the open air, and not within a building; and second, congregations or assemblies of persons gathered together within their place or house of worship. It was intended to throw around a camp meeting, when a particular piece of ground had been set apart for the purposes of such meeting, and houses which are dedicated to, appropriated and used by a congregation or assembly of persons for purposes of public worship, the same sanctity and protection which is thrown around every person's domicile in protecting the family from disturbance.

The indictment in this case charges no such offense as is above described, but, on the contrary, seems to charge defendant with disturbing a congregation which had assembled at the southeast corner of the public square, in the city of Hannibal, by rude and indecent behavior, and by attempting to drive a horse fastened to a wagon against, into, and through said congregation. The act upon which this indictment is based, has no such scope as to allow the streets of a city to be blockaded by an assemblage of persons for religious worship, and if such an appropriation is made of them, those making it are to be subjected to the annoyances and disturbances incident to the ordinary uses which the public have a right to make of such streets. We do not think that it was sufficiently alleged in the indictment, that the southeast cor-

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ner of the public square was the place of worship of the congregation there assembled, if alleged at all it is only argumentatively averred.

When the statute creates an offense, it is always safe for the pleader to charge it in the language of the statute.

Judgment affirmed, in which the other judges concur, except Sherwood, C. J., absent.

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**CLARA WILCOX, et al., Respondents, vs. ALBERT TODD, et al.,  
Appellants.**

1. *Husband and wife—Mortgage on property of wife to secure husband's debts—Wife's equity to compel creditors to resort to other property of husband—Wife's right to testify, etc.*—Where a deed of trust is given by the husband and wife jointly on land of the latter to secure a debt of the husband, she occupies the position of surety toward him, and like any other surety may compel a creditor of the husband holding a mortgage on other property of his to resort thereto in the first instance before subjecting her property to the payment of his debts; and *a fortiori* she has that right when the creditor has no such security; and her equity is unaffected by the fact that her land is not owned by her as a separate estate. And in such suit being the real party in interest she is competent to testify.
2. *Practice, Supreme Court—Evidence—Bill of exceptions.*—The Supreme Court will notice no evidence not embodied in the bill of exceptions.

*Appeal from St. Louis County Circuit Court.*

*E. P. McCarty, Jas. O. Broadhead, Crews & Laurie*, for Appellants, cited: *Kimm vs. Weippert*, 46 Mo. 532; *Whitesides vs. Cannon*, 23 Mo. 457; *Claffin vs. Van Wagoner*, 32 Mo. 252; *Gahn vs. Niemcewicz's Ex'r*, 11 Wend. 312.

*Martin & Lackland*, for Respondents, cited; *Gahn vs. Niemcewicz's Ex'r*, 3 Paige, 614; *John vs. Reardon*, 11 Md. 468; *Vartie vs. Underwood*, 18 Barb. 561; *Fitch vs. Cotheal*, 2 Sandf. 29; *Ten Eyck vs. Holmes*, 3 Sandf. 428; *Wright vs. Austin*, 56 Barb. 13; *Loomer vs. Wheeler*, 3 Sandf. 135.

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SHERWOOD, C. J., delivered the opinion of the court.

One of the plaintiffs, Jeremiah Wilcox, owned a piece of property on Third street, in the city of St. Louis. His wife, Clara, owned another piece on Broadway. Her husband borrowed \$15,000, and to secure the debt executed a deed of trust to Todd as trustee, whereby was conveyed to the latter the Third street property, as well as that on Broadway, the wife joining in the conveyance. Subsequently, the husband borrowed of Ignacy Sumowski \$6,000 more, executing a second deed of trust, on the Third street property, to Jno. Wickham as trustee. Defendants, Maud & Hastings, who are creditors of Wilcox, became the purchasers of the Third street property, when sold by Wickham, under the second deed of trust. The court below, on the application of the wife, as the surety of her husband, decreed that Todd, the trustee, should first sell the Third street property, before resorting to that of the wife, and enjoined Maud & Hastings from interfering with her rights, etc., etc. From this ruling defendants appeal.

Leaving undetermined the question of the husband's competency as a witness in this case, it is enough to say that the wife, being the real party in interest, was competent to testify (*Buck vs. Ashbrook*, 51 Mo. 529, and case cited; *Quade vs. Fisher*, 63 Mo. 325); and her testimony clearly establishes that she, in conveying her property on Broadway, by the deed of trust, made by herself and husband to Todd, the trustee, whereby the Third street property was also conveyed, only occupied the attitude of surety towards her husband. And when such a relation is established the law is well settled, that the wife may as readily avail herself of all the beneficial rights and remedies, conferred thereby, as any other surety whatsoever. And there is frequent application of the equitable rule which primarily throws the burden of the debt on the property of the principal debtor, and exhausts that fund in exoneration of the estate of the surety. The doctrine here asserted, both with regard to ordinary sureties and also to the wife when occupying such an attitude, finds abundant recognition in the following authorities:

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Niemcewicz vs. Gahn, 3 Paige, 614; S.C., 11 Wend. 312; Johns vs. Reardon, 11 Md. 465; Sto. Eq. Jur. §§ 642, 1373; Wright vs. Austin, 56 Barb. 13.

The equity of the wife in this regard is paramount to the claim of a creditor who has a general lien on the husband's property, subject to the mortgage. (3 Paige and 11 Md. *supra*.) And the claim of Maud & Hastings, who are merely creditors of the husband, would certainly not be of any higher nature. They surely can claim no greater rights than those of Sumowski, under whose deed of trust they purchased. But his equity, if he possessed one, being subsequent in point of time was inferior in point of right to that of the wife.

Frequent reference is made in the briefs of counsel to the deeds of trust and marriage contracts as showing that the wife had a separate estate in the Broadway property; that the first deed of trust gave notice by its terms of the suretyship of the wife, and that, by the words employed in the second deed of trust, she had relinquished every interest she may have possessed under the first deed of trust. We can notice none of these matters, as none of these instruments have been preserved in the bill of exceptions. The action of the lower court, in regard thereto, will therefore be presumed correct.

The testimony of Laurie, the attorney of Maud & Hastings, would seem; however, to indicate that he was apprised of the wife's equity before he made the purchase for them.

If the wife had no separate estate she could not be regarded as a *feme sole* in respect to the Broadway property, and consequently could have no agents to prejudice, by their acts and declarations, her rights. But the fact that the wife had no separate estate in that property, cannot at all affect her right to equitable interposition in her behalf as surety. (John vs. Reardon, *supra*; Niemcewicz vs. Gahn, *supra*.) We discover no error in the record, and shall affirm the judgment.

All the other judges concur.

## STATE OF MISSOURI, Respondent, vs. THOMAS JONES, Appellant.

1. *Indictment—Instruction to convict of murder or acquit.*—Where the evidence is of a character to authorize it, the court may properly give an instruction that the jury must either convict the prisoner of murder in the first degree, or acquit him.
2. *Practice, criminal—Murder—Intent, continuance of, for what length of time necessary.*—If homicide is committed, not in the heat of passion or with lawful provocation, and the prisoner deliberately and with malice aforethought intend the killing for any length of time beforehand, no matter how short, he is guilty of murder in the first degree.
3. *Instruction commenting on evidence.*—An instruction singling out a portion of testimony and commenting thereon is improper.
4. *Murder—Uncorroborated testimony of accomplice, how to be received by juries.*—The testimony of those abetting and encouraging murder in relation thereto, when uncorroborated by that of others not implicated, although admissible, should be received with great caution by the jury; and they should not convict on such testimony alone, unless satisfied of its truth.
5. *Instruction—Evidence—Refusal of.*—An instruction not based upon evidence is properly refused.
6. *Witness—Recalling of, for purpose of impeachment.*—A party after cross-examining a witness of the other side may by permission of court recall and question him for the purpose of impeaching him, and afterward introduce other testimony to that end. He does not by so recalling him make the witness his own.
7. *Witness called for particular purpose—Cross-examination of.*—Semble, that a witness examined on any point may be cross-examined by the other side touching all matters pertaining to the case.
8. *Jury—Competency of juror.*—The fact that he is father-in-law of the prosecuting attorney does not render a juror incompetent.

*Appeal from New Madrid County Circuit Court.*

*Riley & Conran*, for Appellant, cited: Sess. Acts. 1875, 78; *State vs. Roberts*, 15 Mo. 28; 1 Greenl., § 380; *Gearhart vs. Smallwood*, 5 Mo. 542; 1 Greenl. Ev., §§ 110, 111, 363, 380, 381.

*J. L. Smith, Att'y Gen'l*, for Respondent, cited: Wagn. Stat. § 14, 1103; 1 Grah & Wat. New Trials, 35, 36-40; *Steele vs. Maloney*, 1 Minn. 347; *Thrall vs. Smiley*, 9 Cal. 529; *Forsythe vs. State*, 6 Ohio, 9; 1 Mo. 527; 16 Mo, 385; 31 Mo. 361; *State vs. Byrne*, 24 Mo. 151; *State vs. Starr*, 38 Mo. 273; *State vs. Joeckel*, 44 Mo. 236; *State vs. Schoenwald*, 31 Mo.

153; State vs. Ross, 29 Mo. 32; 31 Mo. 361; Turner vs. Baker, 42 Mo. 16; State vs. Harrold, 38 Mo. 496; State vs. Smith, 31 Mo. 566; State vs. Wissmark, 36 Mo. 592; Beale vs. Cullan, 31 Mo. 258; State vs. Linney, 52 Mo. 41.

HENRY, Judge, delivered the opinion of the court.

At the September term, 1874, of the New Madrid Circuit Court, defendant and George Horner, Charles Motes, William Ewill, Walter Scott Jacobs and James F. Russell were jointly indicted for the murder of Frank O'Bannon. At the following March term the cause was continued to the ensuing September term, but at an adjourned term of said March term, held in July, 1875, by consent of parties, the order of continuance was set aside, and a jury sworn to try the case, which, failing to agree upon a verdict, was discharged, and both parties consenting another jury was summoned and a trial had, which resulted in a conviction of defendant for murder in the first degree.

Defendant filed his motion for a new trial, alleging as reasons why it should be granted: 1st, that the verdict was against the law and the evidence; 2d, that the jury was improperly impaneled, in that Samuel T. Davis, one of the attorneys representing the State, selected the panel to be returned to the court; 3d, for misbehavior of the jury in allowing persons hostile to defendant to talk with them, and in their presence, in regard to the case; 4th, because the court erred in giving instructions for the State, Nos. 1, 2, 3, 4 and 5, and in refusing instructions Nos. 5 and 6 asked for by defendant.

The motion for a new trial was overruled, and judgment entered in accordance with the verdict, from which defendant has appealed to this court.

The second and third grounds alleged in the motion for a new trial are allegations of facts, not supported by any proof whatever, and will therefore receive no further notice.

The instructions for the State were as follows:

1. "Under the law and evidence in this case, the defendant, Jones, is guilty of murder in the first degree, or nothing, as you shall believe from the evidence."



2. "The defendant, Thomas Jones, is charged with murder in the first degree, by having wilfully, deliberately, premeditatedly and of his malice aforethought, killed one Frank O'Bannon, by shooting him with a shot gun. The word 'wilfully,' as here used, means intentionally, and not accidentally; the word 'deliberately' means in a cool state of blood, that is, not in a heated state of the blood caused by lawful provocation, and the word 'premeditatedly' means thought of beforehand, any length of time, however short. Therefore, if you believe that defendant, Thomas Jones, in malice, did wilfully or intentionally shoot and kill Frank O'Bannon with a shot gun or pistol, and that he did so without being in a heat of passion, caused by a lawful provocation, and that he thought of killing said Frank O'Bannon beforehand any length of time, however short, then he is guilty of murder in the first degree, and the jury should so find."

3. "Although it is alleged in the indictment that the defendant, Thomas Jones, fired the fatal shot, and that George Horner and others were present, aiding, abetting, helping and assisting him to kill and murder Frank O'Bannon; yet, if the jury should believe from the evidence that George Horner was, in fact, the person who really fired the fatal shot, and that defendant, Jones, was present, aiding, abetting, assisting and helping said George Horner to kill the said Frank O'Bannon, as aforesaid, then, and in that case, said Thomas Jones is still guilty of murder in the first degree, and the jury should so find."

4. "It is immaterial, in this case, whether the shooting was done with a pistol or a shot gun, or both."

5. "Although the jury may believe that Motes did state to Edmonson the next morning after the killing, that 'he emptied his pistol at the negro last night,' and although you may believe that Motes was wrongfully in company with Jones and others at the shooting of Frank O'Bannon, still, if the testimony of Motes is corroborated by other witnesses, you are at liberty to give his evidence full credit."

The first instruction asked by the defendant was, substantially, that the burden of proof was on the State. The second, that if any witness had wilfully sworn falsely to any material fact, the

jury might disregard his testimony. The third was the usual one in regard to reasonable doubt, and the fourth, that if the jury found from the evidence that, at the time of the shooting Jones was not present, but at another place, they should acquit.

The 5th asked by defendant and refused, was as follows: "The testimony of parties aiding, assisting, encouraging and abetting the crime, is admissible; yet their evidence, when not corroborated by the testimony of others not implicated in the crime, as to matters material to the issue, ought to be received with great caution by the jury, and they ought to be fully satisfied of its truth, before they should convict defendant on such testimony."

The 6th instruction asked by defendant and refused, was, that if the jury believed from the evidence that at the time Frank O'Bannon was killed, said defendant was present, but did not participate in the killing, aid, assist, encourage or abet in the same, they should acquit said defendant.

The widow of deceased testified that a number of men came to her house, and two of them entered it and took her husband out, and soon after she heard reports of fire-arms, and next morning found her husband dead. She did not recognize the men she saw at her house. The State then introduced Wm. Ewill and Charles Motes, in the order here named, and defendant objected to them as incompetent, because jointly indicted with Jones, but the objection was overruled, and it is sufficient to say that in that there was no error. Their testimony was direct to the killing of O'Bannon by Jones and George Horner, witnesses both being present.

Defendant cross-examined these witnesses, and after the State rested, and defendant had examined several witnesses in chief, he recalled Motes and asked him the following question: "Did you, or did you not, on Tuesday during the last March term of our circuit court, state to William Gooch, in the Main street of New Madrid town, that your lawyers advised you to turn State's evidence against Mr. Jones, and that you were going to do so, because Mr. Jones had threatened you, or words to that effect?"

To which witness answered: "I did not make such a statement to Mr. Gooch, or to any one."

Mr. Gooch was then called by the defense, and was asked if Motes did not, at the time and place named in the question propounded to Motes, tell him that his (Motes') lawyers had advised him to turn State's evidence, and that he was going to do so, as Mr. Jones had threatened him, or words to that effect? The State objected to the witness answering the question, and the objection was sustained, and the ruling excepted to.

The first instruction given for the State is sanctioned by repeated decisions of this court. (State vs. Byrne, 25 Mo. 151; State vs. Starr, 38 Mo. 273; State vs. Joeckel, 44 Mo. 236; State vs. Schoenwald, 31 Mo. 147.) The evidence warranted the instruction. If the witnesses for the State were to be believed, defendant was guilty of murder in the first degree. If they were unworthy of credit, there was no evidence to convict him of any crime. On the evidence a conviction for murder in the second degree, or manslaughter in any degree, would have had no evidence to support it.

The second instruction is substantially correct, and defines the words "wilfully, deliberately" and "premeditatedly" as heretofore uniformly defined by this court. (State vs. Holme, 54 Mo. 155.)

We have discovered no error in the other instructions except the fifth, to which it may be objected that it is a comment upon specific portions of the evidence. It is not, perhaps, such an error as would justify a reversal, if the case had been in all other respects fairly tried; but as the judgment will be reversed for reasons hereinafter given, we call attention to the impropriety of such an instruction. We do not mean to be understood that a case might not be presented in which, for this error alone, the judgment would be reversed, but confine the remark to the instructing and the case we are considering.

The 5th instruction asked by defendant should have been given.

The witnesses for the State who testified directly to the shooting of O'Bannon by defendant, were persons jointly indicted with

him. The degree of credit to be given to the testimony of an accomplice is a matter exclusively for the jury to determine. They may convict on his evidence without any corroboration of his statements, but jurors, having a proper appreciation of the responsibility resting upon them, would observe great caution in weighing his testimony, and hesitate to convict one of murder on the uncorroborated testimony of an accomplice in the alleged crime, and probably testifying under a promise of pardon. Mr. Greenleaf says, Vol. 1, § 380: "It has sometimes been said, that they (juries) ought not to believe him (an accomplice) unless his testimony is corroborated by other evidence; and without doubt great caution in weighing such testimony is dictated by prudence and good reason. But there is no such rule of law; it being expressly conceded that the jury may, if they please, act upon the evidence of an accomplice without any confirmation of his statement. But, on the other hand, judges in their discretion will advise a jury not to convict of felony upon the testimony of an accomplice alone, and without corroboration; and it is now so generally the practice to give them such advice, that its omission would be regarded as an omission of duty on the part of the judge."

It being the law, as Mr. Greenleaf in the above paragraph states, that one may be convicted of a felony on the uncorroborated testimony of an accomplice, makes it the more necessary that juries should be properly cautioned by the court in regard to such testimony.

The sixth instruction asked by defendant was properly refused. There was no evidence, whatever, that if present, defendant did not participate in the killing of O'Bannon. There was evidence for defense conducing to prove an *alibi*, and the court gave a proper instruction for that aspect of the case. but all the other evidence, whatever credit may be given to it, was that defendant was present participating in the homicide.

The court erred in refusing to permit Gooch to answer the question propounded to him by the defense. A proper foundation had been laid for it. But it is insisted by the State that when defendant recalled Motes he made him his own witness and

could not impeach him. We suppose that this was the reason for the exclusion of the testimony. We do not so understand the law. It is but a continuation of the cross-examination of the witness by permission of the court. The testimony sought to be elicited was not evidence in chief for the defense, of the facts tending to prove his *alibi*, or any other facts directly exculpating him, but only went to the credit of the witness for the State, and the question propounded to Motes was legitimate cross-examination. "Whether, when a party is once entitled to cross-examine a witness, *this right continues through all the subsequent stages of the cause*, so that if the party should afterwards recall the same witness to prove a part of his own case, he may interrogate him by leading questions, and treat him as the witness of the party who first adduced, is also a question upon which different opinions have been held. Upon the general ground on which this course of examination is permitted at all, namely, that every witness is supposed to be inclined most favorably towards the party calling him, there would seem to be no impropriety in treating him, throughout the trial, as the witness of the party who first caused him to be summoned and sworn." (Greenl. Vol. 1, § 447.) It will be observed that Mr. Greenleaf thinks that the better doctrine is, that even where one calls the witness of his adversary to make out his own case, he should still be treated as the witness of the party first calling him. Without going so far, we think the court erred in refusing to permit Gooch to answer the question asked him.

Other points were made for defendant in his counsel's brief which it is unnecessary to notice at length, inasmuch as they relate to the manner of summoning the panel of jurors, and to the refusal of the court to exclude from the panel one whom defendant thought there was sufficient ground for excluding. It is sufficient to say, that the oath taken by the sheriff and his deputies was the proper one, and the fact that La Forge was the father-in-law of the prosecuting attorney did not render him incompetent as a juror. It may be well to suggest that before another trial, if either defendant desires a separate trial, a proper order

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of severance should be made by the court. No such order appears in the record, and yet it appears that Jones was tried separately.

Judgment reversed and cause remanded, all the judges concur.

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STATE OF MISSOURI, Respondent, *vs.* POINDEXTER EDMUNDSON,  
Appellant.

1. *Murder—Indictment—Failure to allege in what part of the body wound was given—Jeofails, statute of.*—An indictment for murder which alleges that the prisoner \* \* \* "did strike, penetrate and wound him, the said E., in and about divers places of the body," etc., is not under the statute of jeofails (Wagn. Stat., 1090, 1091, § 27 and clause declaring an indictment not invalid "for want of the averment of any matter not necessary to be proved") fatally defective for failing to state in what part of the body the wound was inflicted; since it is not necessary to prove that fact as alleged, if stated.

*Appeal from Stoddard County Circuit Court.*

*H. H. Bedford*, for Appellant, cited: State vs. Dean, 7 Blackf. 20; 2 How. Pleas Cr. Ch. 23, § 80; Id. 224; also 5 Coke, 245; 1 Chit. Crim. Law, 239-244; 1 Whart. Crim. Law, 592, § 1069; see also Whart. Prec. 155, 156; State vs. Peimberton, 30 Mo. 376.

*J. L. Smith, Att'y Gen'l*, for Respondent, cited: Cordell vs. State, 22 Ind. 1; Arch. Crim. Pl. (10th Ed.) 408; State vs. Farley, 14 Ind. 23; Malone vs. State, 14 Ind. 220; State vs. Murphy, 21 Ind. 441; Welchell vs. State, 23 Ind. 89; 2 Bish. Crim. Proc. § 522; Rex vs. Culkin, 5 Car. & P. 121; Rex vs. Gromsell, 7 Car. & P. 788; Rex vs. Edwards, 6 Car. & P. 401; Rex vs. Warman, 1 Den. C. C. 183; 2 Car. & K. 195; East P. C. 343; Sanchez vs. The People, 22 N. Y. 147; 4 Parker's Crim. Cases, 535 and Com. vs. Woodward, 102 Mass. 159; Long's Case Coke, part. 5, p. 120; 1 Russ. Crimes, 558-562; The People vs. Powers, 2 Seld. 50; State vs. Green, 7 Ired. 39; Wagn. Stat. 1090, § 27.



NORTON, Judge, delivered the opinion of the court.

Defendant was indicted in the Circuit Court of Stoddard County, at its December Term, 1876, for murder in the first degree, for killing William Shaw on the second day of October, of that year. At the March Term, 1877, of said court, a trial was had which resulted in the return of a verdict of murder in the first degree, upon which the judgment of the court was duly entered.

A motion for a new trial as well as a motion in arrest of judgment having been overruled, the cause is brought to this court by appeal.

The only point urged before us for a reversal of the judgment is, that the indictment does not allege on what part of the body of the deceased the mortal wound was inflicted.

It seems to be conceded that the indictment is perfect in every other particular, and we therefore only copy so much of it as constitutes the basis of defendant's objection.

The following is the language used by the pleader: "And the said Poindexter Edmundson with the leaden bullets aforesaid, out of the gun aforesaid, then and there by force of the gunpowder aforesaid, by the said Poindexter Edmundson shot off and discharged as aforesaid, then and there feloniously, wilfully, deliberately, premeditatedly and of his malice aforethought, did strike, penetrate and wound him, the said William Shaw, in and upon divers places of the body of him, the said William Shaw, giving to him, the said William Shaw, then and there with the bullets aforesaid, so as aforesaid discharged and shot out of the gun aforesaid by the said Poindexter Edmundson, one mortal wound of the depth," etc.

We have been cited to various authorities to establish the proposition that in an indictment for murder, it is necessary to allege on what particular part of the body of the deceased the wound producing death was inflicted.

It is said in 3 Chit. Crim. Law, (735) that "when the death is occasioned by a wound or stroke, it is necessary to set forth the part of the body to which violence was applied, and if it

merely stated the wound to be near or about the breast, it would be defective. But it is sufficient to state the wound to have been given in the breast, the neck, the stomach, or even the body.

In Whart. Crim. Law, 1069, it is said that "the indictment must state in what part of the body the wound was inflicted, but if the wound be stated to be on the right side, and be proven to be on the left side, the variance is not fatal."

These authorities and others, to which we have been referred, while they clearly establish the proposition that an indictment for murder which does not state the particular part of the body on which the wound producing death was given, is defective, also clearly establish the further proposition that when the indictment does charge that the mortal wound was inflicted on a particular part of the body, it is not necessary to prove the charge as laid, but the prosecution may prove on the trial that it was inflicted on any other part of the body; that the wound may be alleged to have been on the right side and be proved to have been on the left side.

So that it would appear in sound reason that it is a hard and rigorous rule which requires an allegation to be made in a pleading which may be ignored, disregarded, disputed and contradicted by the pleader in his proof.

But conceding that such was the rule at common law, and that it was recognized to be so by this court in the case of the State vs. Jones, (20 Mo. 58) the question arises what is the effect of Wagn. Stat., 1090, § 27, which declares "that no indictment shall be deemed invalid, nor shall the trial judgment or other proceedings thereon be stayed, arrested, or in any manner affected, for the want of an averment not necessary to be proved."

If, as is argued under the common law rule, the indictment in the case at bar is defective in not stating the particular part of the body on which the wounds occasioning death were inflicted, inasmuch as under the same rule, if the wounds had been charged to have been inflicted on any particular part of the body, it would not be necessary to prove that they were so inflicted, but might be shown to have been inflicted on any other part, the provision of

the statute above quoted would take the indictment from under the operation of such rule.

The case of the State vs. Jones, *supra*, was decided in 1854 under the revised code of 1845. While the code of 1845 under the head of practice in criminal proceedings recited many omissions which would not render an indictment invalid because of the omission, it did not contain the clause above quoted touching the omission to make "an averment not necessary to be proved." The latter provision was not incorporated into the laws of the State till in December, 1855, and was not therefore before Judge Ryland who delivered the opinion in the case of the State vs. Jones, *supra*. In the latter case, *Dias vs. The State*, (7 Blackf., 20,) was cited as an authority and relied upon here. This case has been in effect overruled in the 10th Ind. 309 and 559; 8 Ind. 200; 14 Ind. 23, 220; 21 Ind. 441, also in the case of *Cordell vs. State*, 22 Ind. 1.

In the latter case it was held that an indictment charging the defendant with "cutting, stabbing, and mortally wounding Patrick Quirk with a knife, etc.," was sufficient. In the opinion the following language is used: "We admit the common law required the allegation in the indictment (the part of the body on which the wound was given). *Dias vs. The State* (7 Black. 20). But in Arch. Crim. Prac. (side p. 408), even as to this it is said that "in this and other instances there is a particularity required in an indictment for murder, which it would be ridiculous to attempt to account for or justify; for the same strictness is not required as to the evidence necessary to support it. If, for instance, the wound be stated to be on the left side and proved to be on the right side, or alleged to be in one part of the body and proved to be in another, the variance is immaterial, and for that reason the objection can only be taken by demurrer. This shows that even at common law, the allegation stood upon the same footing as the allegation as to the hand in which the weapon was held, the depth and size of the wound, etc., all of which are now held to be immaterial."

In case of *Sanchey vs. The People* (4 Park. C. C. 535), decided by the Supreme Court of New York and affirmed by the  
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court of appeals in 22 N. Y. 147, the indictment charges the wound to have been made by a "sword," etc., in and upon the body of Cowan, etc., and it was held to be sufficient. The court observes that the term "body," in such a connection, clearly means "that part of the human frame to which the head and arms are attached. Of what consequence is it whether the wound was given to the left side or to the right side, below the fifth rib or above the fifth rib, or whether there be two wounds or one; if both or either were mortal? That these minute particulars are not matters of substance is evident from the well established rule, that, if averred one way in the indictment they may be proved another way on the trial. The statute also admonishes us to disregard the mere cobwebs of former days. No indictment shall be deemed invalid, etc., by reason of any defect or imperfection in matters of form, which shall not tend to the prejudice of defendant."

In the opinion of the Supreme Court, (22 N. Y., *supra*) affirming the judgment, it is observed that "the indictment does not otherwise show on what part of the body of Cowan the mortal wound was given. The indictment is sufficiently certain in this respect. By the word 'body' in this connection is to be understood the trunk of the man in distinction from his head and limbs. This is the doctrine of the books on the subject." (Long's case, 5 Coke, 120.)

In the case of the Commonwealth vs. Woodward, (102 Mass. 159) the objection was that the indictment did not describe the wound as to length, depth, etc., but only described it as one mortal wound. In disposing of the question, the court observes that "we are of the opinion that the tendency of modern jurisprudence and legislation is such as to justify, if not to require, a departure from the old rule of pleading in a matter which is practically so nearly one of mere form." Similar views are expressed in *State vs. Green*, 7 Ired. 39; *State vs. Moses*, 2 Dev. 452; *Real vs. The People*, 42 N. Y. 279.

It is, however, urged by counsel, that under the views expressed by this court in the case of the *State vs. Pemberton* (30 Mo. 377) the common law rule, as to the necessity for stating the

particular part of the body on which the wound was inflicted, still applies, notwithstanding our statute. We think that this is a misconception of what is there said.

Judge Napton, who delivered the opinion, observes: "It is contended, however, that our statute, which provides that a judgment in a criminal case shall not be arrested for any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits, has changed the law in this respect. The section of the statute, in which this provision occurs, commences by enumerating a great number of trivial defects, such as the omission of defendant's title, the words 'with force and arms,' etc., and then concludes with the general clause above referred to, which covers all other defects or imperfections not tending to defendant's prejudice."

"Whether the general clause is to be interpreted as extending the operation of the specific provisions which precede it, is not necessary to be decided here. We think, upon every safe rule of construction, that it should at all events be limited to imperfections of the class or character previously enumerated. To give it a more extended meaning would be to make all the specifications in the same section useless."

The indictment in that case was held to be bad, because the objection urged against it was not cured by any specific provision of the statute. But the objection urged in the case at bar is expressly provided for in that part of the section which declares that "no indictment shall be deemed invalid, nor judgment thereon arrested, for want of any averment not necessary to be proved."

It appearing from the record that the evidence justified the finding of the jury, the judgment, with the concurrence of the other judges, is affirmed.

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Garrett v. Bicknell.

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W. J. GARRETT, Respondent, vs. J. D. BICKNELL, Appellant.

1. *Administrator—Sale of property by to satisfy purchase price contracted for by decedent—Petition—Appraisement—Dade probate court, jurisdiction of—Suit to divest title—Joinder of parties, etc.*—Where land purchased but not paid for by the intestate in his lifetime, is sold by the administrator for the payment of the purchase price, and there is due notice and report thereof, the sale may be legally made under the statute (Wagn. Stat. 93, 94, §§ 2, 3), without a petition therefor, or an appraisement of the property. And where such sale was made under the orders of the probate court of Dade county, that tribunal, under the Sess. Acts of 1844-5, p. 71, had jurisdiction to make such orders. And in suit by the purchaser of the land at the administrator's sale, to divest the title out of an adverse purchaser, the heirs of the intestate are not necessary parties.

*Appeal from Greene County Circuit Court.*

*Massey, McAfee & Phelps, with J. C. Cravens*, for Appellant, cited: Sess. Acts 1844-5, p. 70; Lake, Adm'r, vs. Meir, Adm'r, 42 Mo. 390; Wagn. Stat. 96-7, §§ 25, 26, 27; Valle vs. Fleming, 19 Mo. 454; Strouse vs. Drennan, 41 Mo. 289; Robert vs. Casey, 25 Mo. 584; Gladson, Adm'r, vs. Whitney, 9 Ia. 267; Smith, Adm'r, vs. McConnell, 17 Ill. 135.

*Bray & Duckwell*, for Respondent, cited: Valle vs. Fleming, 19 Mo. 454; Owen vs. Johnston, 17 Mo. 442; Fry vs. Kimball, 16 Mo. 21; Strouse vs. Drennan, 41 Mo. 297; Tutt vs. Boyer, 51 Mo. 429; Ruggles vs. Webster, 55 Mo. 246.

NORTON, Judge, delivered the opinion of the court.

This is a suit in equity, instituted in the Dade county circuit court, to divest defendant of title to certain lands in said county. The petition alleges that the title to said land in 1858, was in one Moore, at which time Moore sold the land to one Owen Craig, executing to him a title bond in which he bound himself to convey the land to Craig upon the payment of the purchase money, for which Craig executed to Moore his promissory note for the sum of \$260, payable on the 25th day of December, 1860, with interest from first day of July, 1859.

The petition alleged that \$100 was paid on said note in April, 1860; that it was afterwards assigned to one Moore & Buster,



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and, by said Moore and Buster, afterwards assigned to plaintiff, Garrett; that in December, 1867, plaintiff purchased all the interest of said Craig in said land, and that defendant Bicknell, in 1871, having full knowledge of the sale of said land by Moore to Craig, and full knowledge of plaintiff's purchase of Craig's interest, procured said Moore to convey to him said land, and accepted said conveyance for the purpose of cheating and defrauding plaintiff.

Defendant, in his answer, alleges that said Owen Craig was dead at the time the suit was commenced; that he left heirs who were not made parties to the proceeding; and denies specifically the allegations of the petition.

A demurrer to so much of the answer as sought to have the heirs of Craig made parties was sustained, and the cause having been removed, by change of venue, to the circuit court of Greene county, was then tried, and a judgment and decree rendered for plaintiff, from which defendant has appealed.

On the trial, plaintiff offered evidence sufficient to show that defendant, at the time of his purchase from Moore, had knowledge of the rights and equities of plaintiff. It was also admitted that the note mentioned in plaintiff's petition was given for the land in controversy; that it was assigned by Moore to Moore & Buster, and by them assigned to plaintiff, and that he was the legal owner of the same at the time of the commencement of proceedings thereon against Craig's estate, in the probate court of Dade county, and that Moore's title bond to Craig had been lost.

Moore testified that Bicknell, the defendant, knew of the existence of said bond, and took the deed from him to the land; that he told defendant, who was a lawyer, that he had no title to the land; that it belonged to Garrett. Defendant's reply was, that he wanted a quit-claim deed so that he could litigate the title. This latter statement was contradicted by defendant and one other witness.

The plaintiff offered in evidence a deed executed by the administrator of Craig, in December, 1867, conveying to him all the right, title and interest of said Craig to the land in controversy. This deed recites the order of the court authorizing the sale, for

the purpose of paying the purchase money for said land; that the sale was made in pursuance of the order, and that plaintiff became the purchaser at and for the amount of his judgment against the estate of Craig, on said note; that at the next term after sale he made report of the same, which was duly approved.

The defendant objected to the introduction of this deed; 1. because there was no petition for sale of real estate, no proper order of sale, no appraisement, no legal report of sale, no proper approval of sale, and that the probate court had no jurisdiction to make the order. These objections were overruled.

The report of sale and order of court approving the same were also offered in evidence.

The defendant offered in evidence a quit-claim deed from Moore to the land in dispute, dated January 14th, 1871, and also the order of the probate court of Dade county, made on the 6th day of September, 1867, allowing the claim or demand of plaintiff, and directing the interest of Craig, in the land to be sold by his administrator to pay it, and also the order of said court made in December, 1867, approving the sale.

It is provided (Wagn. Stat. 93, 94, §§ 2, 3), that "if any person die having purchased real estate and shall not have completed the payment, nor devised such estate, nor provided for the payment by will, and the completion of such payment would be beneficial to the estate, and not injurious to creditors, the executor or administrator, by order of the court, may complete such payment out of the assets in his hands, and such estate shall be disposed of as other real estate."

"If the court believes that after the payment of debts there will not be sufficient assets to pay for such real estate, the court may order the executor or administrator to sell all the right, title and interest of the deceased therein."

The sale made by the administrator of Craig, and under which plaintiff claims title, was evidently made by virtue of the foregoing provisions of our statute, and the question is presented for our determination, whether such a sale can be legally made without a petition and appraisement.

In the case of *Valle vs. Fleming* (19 Mo. 454,) the identical question here raised seems to have been passed upon, and the court, speaking through Scott, J., said: "Had the sale been under these sections no appraisement would have been required, nor would there have been any necessity for a petition; yet we find both of them among the papers in this cause. It is not pretended that had the sale taken place under these sections, that the appraisement or petition would have affected its validity." The sale, in the above case, was made under the general statutes of 1835, which contained the very same provisions in reference to the sale of the interest of a decedent, in land which he had purchased in his lifetime and not paid for, as are contained in the general statutes of 1865.

The laws of 1865 contain also the same provision, in reference to the duty of administrators before selling real estate or any interest therein to have it appraised, as is to be found in the laws of 1835.

It will be perceived, upon an examination of the law regulating the disposition which shall be made of a decedent's interest in land bought by him in his lifetime and not paid for by him, that the legislature intended to invest the county and probate courts with powers freed from many of the restrictions imposed by those sections regulating sales of land on petition of the administrator, executor or creditor for the sale of real estate to pay debts.

Section four (Wagn. Stat. 94) provides that such court, when the purchase was made of an individual, if in its opinion it would be advantageous to the estate, might order the real estate to be relinquished to such individual on the best terms that could be agreed on; and section five provides that where the purchase was made of an officer authorized to sell school lands, the court, in its discretion, might order the administrator to relinquish the same, and that, in such case, it should be the duty of the officer to accept the relinquishment, and surrender the obligations of the deceased.

The sale in this case was made on due notice, and report thereof was duly made, in accordance with the order of the court, directing the sale at the next term thereafter, which was approved

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by the court. There is nothing in the objection urged, that the probate court of Dade county had no jurisdiction to make such an order, for the fourth section of the Acts of 1844-5, p. 71, which brought that court into existence, plainly confers the jurisdiction which was exercised by the court in the case at bar.

The heirs of Craig were not necessary parties to the determination of the question involved in the suit, they had no interest which could be affected by any decree that might be rendered.

We think the judgment was for the right party, and it will therefore be affirmed. All the judges concur, except Sherwood, C. J., who was absent.

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THE COUNTY OF VERNON TO USE OF SCHOOL FUND, &c., Appellant, vs. JOHN W. STEWART, Respondent.

1. *Limitations, statute of—Bond—Part payment of, by administrator of one of joint makers, effect of.*—Part payment upon a bond made by the administrator of one of the joint makers within the statutory period will prevent the running of the statute of limitations in favor of the remainder.

*Appeal from Henry County Circuit Court.*

*James B. Gantt*, for Appellant, cited: *Craig vs. Callaway* county, 12 Mo. 94; *Black vs. Dorman*, 51 Mo. 31; *Lawrence county vs. Dunkle*, 35 Mo. 395; 9 Minn. 13; *Foster vs. Starkey's adm'r*, 12 Cush. 324; *McClurg vs. Howard*, 45 Mo. 365; *Wyatt vs. Hodson*, 8 Bing. 309; 12 Cush. 325; 3 Munf. 191; *Perham vs. Raynal*, 2 Bing. 306; *Burleigh vs. Scott*, 8 Barn. & Cr. 36; *Pease vs. Hirsh*, 10 Barn. & Cr. 122; *Chippendale vs. Thurston*, 4 Car. & P. 98; *Wyatt vs. Hodson*, 8 Bing. 309; *Sigourney vs. Drury*, 14 Pick. 387; *Corlies vs. Fleming*, 32 N. J. 349; *Bound vs. Lathrop*, 4 Con. 336; 9 Conn. 496; *Joslyn vs. Smith*, 13 Ver. 353; *Cox vs. Bailey*, 9 Ga. 467; *Johnson vs. Beardslee*, 15 John. 3; *Wilk. Lim.* 87; *Baxter vs. Penniman*, 8 Mass. 133; *Sullivan vs. Holker*, 15 Mass. 374; *Brown vs. Anderson*, 13 Mass. 201; *Emerson vs.*

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Thompson, 16 Mass. 428; Manson vs. Felton, 13 Pick. 206; Peaslee, Adm'r vs. Breed, 10 N. H. 489; Whitcomb vs. Whiting, 2 Doug. 651.

*B. G. Boone*, for Respondent, cited: Smith's Adm'r vs. Irwin, 37 Mo. 169; Cape Girardeau Co. vs. Harbinson's adm'r, 58 Mo. 90; Van Kuren vs. Parmlee, 2 Coms. 523; Shoemaker vs. Benedict, 1 Kern. 176; Bell vs. Morrison, 1 Pet. 373; 6 Am. (45 Ala. 89) 693; 1 Kas. 437; 9 Pick. 42; Callaway county vs. Nolly, 31 Mo. 393; St. Charles county vs. Powell, 22 Mo. 525; Abernathy vs. Dennis, 49 Mo. 468.

SHERWOOD, C. J., delivered the opinion of the court.

Action on school bond against defendant as one of the sureties thereon. Plea of the statute of limitations.

The cause was tried December term, 1874, of Henry circuit court, by the court without a jury, upon the following agreed statement of facts:

1st. The school bond, the foundation of this suit, was offered in evidence without objection, and was in words and figures as follows: "Twelve months after date, for value received, James Clinton as principal, and John W. Stewart and James W. Morris as securities, jointly and severally promise to pay to the county of Vernon, for the use of the common school fund in said county, the sum of seventy-eight and sixty-one hundredths dollars, to be paid into the treasury of the county of Vernon when this bond shall become due, with interest at the rate of ten per cent. per annum from date until paid, and which interest is payable on the 31st day of December in each year, and in case of default in payment of the interest, or failure of the principal in this bond to give additional security when thereto lawfully required, both the principal and interest shall become due and payable forthwith, and all interest not punctually paid shall become principal and bear interest at the same rate as principal. Witness our hands and seals this first day of January, 1860."

"JAMES CLINTON, [SEAL.]

"JOHN W. STEWART, [SEAL.]

"JAMES W. MORRIS. [SEAL.]"

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It had also the following indorsement on it: "Filed and approved by the court February 9th, 1860; D. C. Hunter, Clerk, by Allen Blake, Deputy Clerk." Also the following: "\$44.33 principal paid December 2, 1869, L. C. Hall, per Wey, and also allowed on the within bond the sum of \$98.13, in the third class of demands, June 7, 1867, Albert Badger, Probate Judge."

It was then mutually agreed by plaintiff and defendant that the payment set up in the petition was made as stated in the petition, and that J. P. Maxey was duly and legally appointed and qualified as administrator of James Clinton, one of the obligors named in the bond sued on, and that said Maxey, as administrator of Clinton, on the 2d day of December, 1869, *and before the bar of the statute of limitations had attached or run against plaintiff, made a payment of \$43.33 on said bond. And it was further agreed that each and every fact stated by plaintiff in his petition was true.*

On part of defendant no evidence at all was introduced, defendant taking the position that plaintiff could not recover on the facts as stated.

The court took the same view of the matter, gave a declaration of law to that effect, and judgment for defendant.

Repeated decisions of this court have settled the matter beyond controversy, that the payment of a portion of a debt evidenced by a promissory note, or similar obligation, by one of the payors before the expiration of the statutory period, would prevent the operation of the statute against the co-maker as well as the party paying. (Callaway county vs. Craig, 12 Mo. 94; Lawrence county vs. Dunkle, 35 Mo. 395; Block vs. Dorman, 51 Mo. 31.) And no reason is seen why the same principle is not applicable, where, as in the present instance, the legal representative of one of the makers makes a similar payment. The statute, after treating of new promises and acknowledgments in writing, and the effect to be given them, explicitly provides: "Nothing contained in the two preceding sections shall alter, take away, or lessen the effect of a payment of principal or interest by *any person*;" thus clearly showing that the legislature intended to



make, and did make, a marked distinction between the attendant results of promises or acknowledgments on the one hand, and partial payments on the other. And if that language just quoted will not comprehend the payment by an administrator, it is difficult to see what language, short of a direct designation of the administrator, would be sufficiently comprehensive to accomplish that result. Had Clinton, the principal in the bond, remained alive and made the payment referred to, no doubt could arise, under the foregoing decisions, but that such payments would effectually prevent the operation of the statute as to the defendant. Can it alter the nature of the case, because the duty of paying the debt is devolved upon the administrator, rather than, and instead of, the decedent?

We are clear that it cannot. If the defendant, instead of the administrator had made the payment, could it be seriously doubted that he would have recourse against the estate of his principal? Upon what theory would such recovery be founded, except that of the continued existence of the mutuality and privity incident to the contract at the time of its formation? In *McClurg vs. Howard* (45 Mo. 365), it was held that although the partnership was dissolved, yet a partial payment before the statute had run by Howard's former co-partners would take the case out of the statute as to him. And it would seem obvious that the dissolution of a co-partnership could accomplish no less towards sundering existing relations, than the death of one of two or more joint obligors. The cases of *Smith's adm'r vs. Irwin* (37 Mo. 169), and that of *Cape Girardeau county vs. Harbison, adm'r*, (58 Mo. 90) have not the slightest applicability here; because in neither case had any payment been made by the administrator. In the former an allowance was had against the estate of one of the makers, *after* the statute had attached, and in the latter case, the administrator had in making a deed of trust, acknowledged, after the claim was barred, the existence of the debt. Any remarks, therefore, in those cases, which are *dehors* the controlling facts incident to each, cannot be deemed as possessed of any authoritative value.

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Holding these views we shall reverse the judgment, and as it is apparent, from the facts agreed on, that it would serve no useful purpose to remand the cause, we shall direct such a judgment as plaintiff should have recovered below to be entered here. All the other judges concur.

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PATRICK H. ROBERTSON, Respondent, *vs.* THE ATLANTIC & PACIFIC R. R. Co., Appellant.

1. *Railroads—Damages to stock—Failure to erect fences and cattle guards at stations—Negligence.*—From motives of public policy the failure of a railroad to fence its track at a station, will not render it liable for the killing of stock at that point, except on proof of actual negligence. And the same rule will obtain touching failure to construct cattle guards at such locality, where it appears that the access of the public to the station would thereby be interfered with.

*Appeal from Cole County Circuit Court.*

*J. N. Litton*, for Appellant, cited: *Lloyd vs. Pacific Railroad*, 49 Mo. 149; *Swearingen vs. M., K. & T. R. R.* ante p. 73; *Morris vs. St. L., K. C. & N. R. R.*, 58 Mo. 78.

*E. L. King*, for Respondent, cited: *Wagn. Stat.* 1872, p. 810, § 43; *Fickle vs. St. L., K. C. & N. R. R.*, 54 Mo. 219; *Walther vs. P. R. R.*, 55 Mo. 271.

NORTON, Judge, delivered the opinion of the court.

This suit was brought to recover damages for the alleged killing, by defendant, of plaintiff's cow. The cause of action was founded upon the fifth section of the Damage Act (*Wagn. Stat.* 520); and upon a trial in the Cole county circuit court, on appeal from the judgment of a justice of the peace, plaintiff obtained judgment, from which defendant has appealed to this court.

The evidence on the trial tended to show, that plaintiff's cow was killed on defendant's road, near Scot's station and east of the station; that the railroad was fenced, on both sides, from

and beyond where the animal was killed to a point a short distance west of the station, where a public road, running north and south, was crossed by said railroad; that there was no cattle guard at and between the public road and said station; that the cow got on defendant's track for the lack or want of such cattle guard; that Scot's station was a point on said road at which defendant's trains stopped to take and put off mails, and receive and discharge passengers and freight; and that the erection and maintenance of a cattle guard at the place where defendant's road crossed, would prevent the public from getting to and from the said station.

Plaintiff, in his evidence, testified that such a result would follow from the maintenance of a cattle guard at the place where his cow entered upon the defendant's road. He also testified that one of the switches of defendant's road extended from the said station across the public road.

Upon the above state of facts, the court, against the objection of defendant, gave the following instruction:

"The jury are instructed, that the defendant is required by law to maintain good and substantial fences on the sides of its road, where the same passes along or adjoining inclosed or cultivated fields, of the height of at least five feet, and to keep and maintain cattle guards at all railroad crossings where fences are required to be maintained and kept up, suitable and sufficient to prevent horses and cattle from getting on the railroad track. If, therefore, the jury shall believe from the evidence, that the plaintiff was, on or about the 13th day of January, 1875, the owner of the cow mentioned in the complaint, and that the cow got on the road of defendant at and from a point where defendant was bound to construct and maintain such cattle guards, and there were no such cattle guards kept up or maintained at such point by defendant; that the cow was killed by the cars of defendant in consequence thereof, at Jefferson township, as stated in the complaint, then they will find for plaintiff, and assess his damages at whatever sum, from the evidence, he has sustained, not to exceed forty dollars."

The following declaration asked by the defendant was refused:

“If the jury believe that Scot’s station is a station on defendant’s railroad, where said railroad receives and discharges freight and passengers, and where said road maintains a station for the use of the public and said railroad, and the grounds thereabouts, and from which plaintiff’s cow strayed on said railroad, were kept open, and no fence or cattle guards there maintained on the sides of said road just west of said railroad station, and that no such fence or cattle guards could be erected, or maintained, without obstructing the access by the public to said railroad station, the said defendant was not bound to construct or maintain said fences or cattle guards to the detriment of the public; and if the jury believe from the evidence that said cow strayed on said railroad in consequence of the failure of defendant to erect and construct said fence and cattle guards, and that in consequence thereof said animal was killed, then defendant is not liable therefor, unless defendant was guilty of negligence in running its trains, whereby said cow was killed; and of this there is no evidence before the jury.”

After refusing the above and other instructions not necessary to notice, the court of its own motion, over the objection of defendant, gave an instruction worded in every respect like the one refused (*supra*), except that the words “cattle guards” were omitted wherever they occurred in the refused instructions.

In the instruction given by the court of its own motion the jury are told, that public necessity would excuse defendants from building fences on the sides of their road at Scot’s station, and in doing this, was fully sustained by the cases of *Lloyd vs. The Pacific R. R. Co.*, 49 Mo. 199; *Morris vs. St. L., K. C. & N. R. R. Co.*, 58 Mo. 78; *Swearingen vs. M., K. & T. R. R. Co.*, 64 Mo. 73. But the very same principle decided in these cases, would also excuse the company from erecting and maintaining a cattle guard, if by such cattle guard the public would be shut out from the station of defendant.

The evidence of the plaintiff, and other witnesses introduced on his behalf, shows that the erection of a cattle guard, at the place where the cow got on the track, would have had that effect.

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We therefore think that the court erred in refusing to give the instruction as asked for by defendant.

We have been cited to the case of *Walther vs. Pac. R. R. Co.*, (55 Mo. 276) as sustaining plaintiff's view. That case simply decides, that when stock are killed by a railroad company, at a point on its road where it is required to be fenced, but is not fenced, it would be presumed that the injury was occasioned by failure to fence the road, in the absence of opposing evidence. In the case at bar the evidence shows that the road was fenced where the cow was killed, and there was also affirmative evidence showing that the cow got on the track for want of a cattle guard.

Judgment reversed and cause remanded, with the concurrence of the other judges.

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STATE OF MISSOURI, *ex rel.*, U. S. NORTON, Respondent, *vs.*  
J. U. LUPTON, Appellant.

1. *Quo warranto—Jury.*—In cases of information in *quo warranto*, defendant has no constitutional right to trial by jury.
2. *City council—Officer—Amotion—Proceedings, what facts should be shown by.*—In a proceeding by a city council for removal of an officer for misconduct in office, the specific acts complained of should be stated, in order that it may appear as a matter of law that that body has jurisdiction of the offense. No intendments on that point or as to the regularity of the proceedings can be indulged in.

*Appeal from Jasper County Court of Common Pleas.*

*Crow & Hess*, for Appellant, cited: *K. C., St. Jo. & C. B. R. R. vs. Nelson*, 62 Mo. 585; *State to use vs. Lingo*, 26 Mo. 500; *High Leg. Rem.*, 437, 606, 676; *State ex rel. vs. Stewart*, 32 Mo. 381-382; *State vs. Vail*, 53 Mo. 107; *State ex rel. vs. Lawrence*, 389; *Dil. Corp. Ed.* 72, § 772; *People vs. Scrugham*, 20 Barb. 302.

*W. H. Phelps, with Walser & Cunningham*, for Respondent.

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State ex rel. Norton v. Lupton.

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HOUGH, Judge, delivered the opinion of the court.

This was an information in the nature of a *quo warranto*, brought at the relation of W. S. Norton against the defendant, Lupton, for an alleged intrusion into and usurpation of the office of city marshal of the town of Joplin.

It appears from the record that the defendant was in October, 1873, elected city marshal of said town of Joplin, and soon thereafter duly qualified and entered upon the discharge of his duties. In the following April an order was made by the city council, removing him from office for some alleged official misconduct, and the relator was appointed to fill his place. In pursuance of a provision in the city charter authorizing the city council to provide by ordinance for the removal from office of all city officers, for neglect of duty or misconduct in office, an ordinance was passed declaring that any officer who should fail or refuse to obey any ordinance, resolution or order of the board of councilmen, should be deemed guilty of a neglect of duty, and that any officer who should willfully violate any ordinance, resolution or order of the city council, or any provision of the original or amended charter, or who should be guilty of habitual drunkenness, should be deemed guilty of misconduct in office. The following record was read in evidence to establish the motion of the defendant: "Charges were preferred and filed by Judge Jacob Hogle, affiant, against J. W. Lupton, defendant, for misconduct in office and neglect of duty. Signed: Lee Taylor, Mayor, J. W. Ried, Clerk. April 15th, 1874. The case of the city of Joplin vs. J. W. Lupton was taken up and some additional evidence taken in behalf of the defendant; the board then retired for a few minutes, and returned the following verdict, viz: The board of councilmen find J. W. Lupton guilty of neglect of duty and misconduct in office, and, on motion, it was resolved that he be discharged from the office of city marshal and said office is hereby declared vacant."

The defendant demanded a jury which was refused, and the cause was tried by the court and a judgment of ouster was ren-



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dered against the defendant, from which he has appealed to this court.

Some doubt has been expressed by the courts of last resort, in several of the States, as to whether the constitutional right of trial by jury extends to cases of information in the nature of *quo warranto*. (State ex rel. vs. Allen, 5 Kas. 213; State vs. Johnson, 26 Ark. 281.) In the latter case, the act of 3 Geo. II., c. 25, providing for juries in informations in the nature of *quo warranto*, was cited as supporting the view that at common law questions of fact in such cases were tried by the court, otherwise there would have been no necessity for the act. The old writ of *quo warranto* was a civil writ at the suit of the crown, and the information in the nature of a *quo warranto*, though originally a criminal prosecution, has long been regarded as a purely civil proceeding, notwithstanding the court still possesses the power to fine any person adjudged therein to be guilty of usurping, intruding into, or unlawfully holding and executing any office or franchise; and if the provisions of our practice act, relating to trials by jury in civil cases, can be held to be applicable to informations in *quo warranto*, a jury to try disputed questions of fact in such cases, cannot be demanded as a matter of right. In the case of the State vs. Vail, 53 Mo. 97, which was an information in the nature of a *quo warranto*, brought by the attorney-general *ex officio*, it was said that the defendant was not entitled to demand a jury. In the case of the State vs. Townsley, which was a like proceeding, a jury was accorded *ex gratia*. We see no error in the refusal of the court to call a jury.

The record of proceedings before the city council, read in evidence, does not contain the specific charges against the defendant, if indeed any such were ever made. The general allegation of misconduct in office and neglect of duty is too vague and indefinite. The specific acts complained of should have been stated, in order that it might appear, as a matter of law, that the council had jurisdiction of the alleged offense. The proceeding authorized is summary, and the record should be precise. No in-

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tendments can be indulged as to the jurisdiction and regularity of the proceedings of the city council in such cases.

The record is insufficient to show a lawful motion, and the judgment will be reversed and the cause remanded; the other judges concur.

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THE FIRST NATIONAL BANK OF KANSAS CITY, Appellant, vs.  
GEORGE NELSON, Respondent.

1. *Kansas City—Act of March 16, 1870—Special tax bills—Grading sidewalks—Wrong computation and apportionment of costs—Rule as to plaintiff's recovery and the amount.*—Section 25 of an act amending the city charter of Kansas City, approved March 16, 1870, and giving the city council power to grade sidewalks, and tax the costs, issue tax bills, etc., provided that "nothing in this section should be so construed as to prevent any defendant from pleading in reduction of the bill any mistake or error in the amount thereof, or that the work therein mentioned was not done in a workmanlike manner."

In suit on a special tax bill for grading a sidewalk when in Kansas City under said act it appeared that the work was done under a contract for grading both sides of the street; that the cost of grading the side on which the ground sought to be charged was situated, was greater than that of the opposite side of the street, but the aggregate cost of the whole work was computed and defendant taxed according to his proportion of the entire frontage of both sides, held, that on proof of these facts by defendant the suit should not be dismissed; but if it could be shown how much of the entire cost was properly chargeable to defendant, plaintiff might recover that amount.

*Appeal from Special Law and Equity Court of Jackson County.*

*Tomlinson & Ross*, for Appellant, cited in argument: *Neenan vs. Smith*, 60 Mo. 292; *First National Bank vs. Arnoldia*, 65 Mo. 229; Sess. Acts 1871-2, 408, § 25.

*Gage & Ladd*, for Respondent, commented at length on same act and decisions.

HENRY, Judge, delivered the opinion of the court.

The bank sued Nelson on a special tax bill assigned to it by the contractor. It was issued for work done in grading a sidewalk

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on Tenth street, in Kansas City. Nelson owned a lot on the south side of said street, against which the tax bill was issued.

The work was done under a contract for grading the sidewalk on both sides of Tenth street, from Main street to an alley east of Cherry street.

The cost of grading the north sidewalk exceeded the cost of grading the south side, but in apportioning the cost of the work the engineer took the aggregate length of the sidewalk, and apportioned the entire cost among the lots on the street according to their frontage.

By this apportionment defendant's lot was assessed \$3.17 more than if the engineer had estimated the work separately for the two sides, charging each side only with the cost of its grading.

There is no controversy about the facts. The court for plaintiff instructed the jury: 1st, that the tax bill offered in evidence is *prima facie* evidence of the validity of the bill, of the doing of the work, of the furnishing of the material charged for, and of the liability of the property to the charge stated in the bill; 2nd, that from the evidence offered the work was substantially completed according to the contract.

The following instruction, asked by plaintiff, the court refused: "Even if both sidewalks were included in the tax bill, yet, if the work was measured on each sidewalk, and from the evidence it can be determined how much is properly chargeable on the lot in question, then the plaintiff is entitled to judgment for the amount properly so chargeable."

The court, at the instance of defendant, gave several instructions, but it is only necessary to notice the fourth, which is as follows:

"If the tax bill in suit is based upon a computation and apportionment of the cost of grading the sidewalks on both sides of Tenth street, and not upon a computation and apportionment of the cost of grading the sidewalk on the south side only of Tenth street, then the finding must be for defendant."

The plaintiff, after the instructions were given, took a non-suit with leave, etc., and on the same day filed his motion to set the

same aside, and for a new trial, which was overruled, and he has appealed to this court.

The instructions asked by the plaintiff and refused, and the one given for defendant present the only question for our consideration.

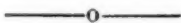
Section 25 of an act, entitled "an act to amend, an act to revise and amend the city charter of the city of Kansas," approved March 16, 1870, confers ample power upon the common council to cause to be graded, paved, or otherwise improved and repaired, all streets, sidewalks, etc., within the city, and authorizes the council to provide by ordinance for charging the cost of all work on any sidewalk, as a special tax upon the adjoining land, according to the frontage thereof on the sidewalk. It is further provided that the city engineer shall compute the cost thereof, and apportion the same among the several lots or parcels of land to be charged therewith, and charge each lot with its proper share of such cost, according to the frontage of the property, and make out and certify tax bills, according to such apportionment in favor of the contractor, against such lots, and deliver such bills to the party in whose favor issued. It is further provided that "such certified bill shall, in an action thereon, be *prima facie* evidence of the validity of the bill, of the doing of the work, and of the furnishing of the material charged for, and of the liability of the property to the charge stated in the bill; *provided*, that nothing in this section shall be so construed as to prevent any defendant from pleading, in reduction of the bill, any mistake or error in the amount thereof, or that the work therein mentioned was not done in a good and workmanlike manner."

The counsel for respondent, in a very able and ingenious argument, contends that the proceedings were *strictissimi juris*, and that the plaintiff could not recover on the tax bill, unless the city engineer made it out correctly; that to permit the court to go into this inquiry is to let the court or jury, whichever tries the issue of the fact, virtually make out the tax bill. The statute makes provision for correcting an error in the tax bill in the proviso we have quoted. It makes the tax bill *prima facie* evidence, but allows the defendant to show an error or mistake in

the amount thereof, or that the work was not done in a workmanlike manner. It does not confine this to mere mistakes in calculations upon correct data, but it equally extends, in our judgment, to correct calculations upon wrong data. The error in this tax bill was not an error in the apportionment of the costs on the basis adopted, but the error was in the basis upon which it was made.

The case of *Neenan vs. Smith* (60 Mo. 292); *The First Nat'l Bank of Kansas City vs. Arnoldia*, 63 Mo. 229, are decisive of this.

The judgment is reversed and the cause remanded, Hough, Judge, not sitting. The others concur except Sherwood, C. J., absent.



DOROTHEA OSTERTAG, Appellant, vs. THE PACIFIC RAILROAD COMPANY, Respondent.

1. *Railroads—Damages—Sitting on tressle work—Instruction as to safety of, etc.* Where a boy sitting on trestle work under one of a train of freight cars was run over and killed by the starting of the train, an instruction was held proper which declared as a matter of law that his position was an unsafe one, without leaving the question to the jury to determine, under all the circumstances.

*Appeal from St. Louis Circuit Court.*

*Leverett Bell, with Jos. T. Tatum & Wm. H. Horner*, for Appellant, cited: *Norton vs. Ittner*, 56 Mo. 351; *Turner vs. Loler*, 34 Mo. 461; *Kinman vs. Cannefax*, 34 Mo. 147; *Meyer vs. Pac. R. R.*, 40 Mo. 151; *First Nat. Bank of Warsaw vs. Currie*, 44 Mo. 91; *S. C.*, 45 Mo. 157; *Wyatt vs. Citizen's R. R. Co.*, 55 Mo. 490; *R. R. Co. vs. Stout*, 17 Wall. 657; *Conroy vs. Vulcan Iron Works*, 62 Mo. 35.)

*J. N. Litton*, for Respondent, cited: *Devitt vs. Pac. R. R.*, 50 Mo. 302; *Barton vs. I. M. R. R.*, 52 Mo. 258; *Evans vs. A. & P. R. R. Co.*, 62 Mo. 59; *Smith vs. Union R. R.*, 61 Mo. 591; *Owens vs. Han. & St. Joe. R. R. Co.*, 58 Mo. 393;

Stoneman vs. A. & P. R. R., 58 Mo. 503; Karle vs. K. C. & St. Jo. R. R., 55 Mo. 483; Norton vs. Ittner, 56 Mo. 351.

NAPTON, Judge, delivered the opinion of the court.

This was an action to recover the damages under the statute for the death of plaintiff's son, alleged to have been occasioned by the negligence of defendant's employees.

The facts, as developed on the trial, appeared to be substantially these. The son of plaintiff, about eleven years old, was, like other boys of his age, in the habit of gathering the remains of wheat found in or under the cars at the railroad depot, and about the wagons employed in hauling the wheat, and, upon the occasion of his death, took his seat upon the tressle work on which the loaded and empty cars were propelled, which was five or six feet above the ground, and upon a sudden jerk of the cars was killed, or so injured that he died the next day.

There was some difference of opinion, among the witnesses, as to whether at the time young Ostertag went under the car there was a locomotive attached to the train or not, or whether if there was he could see it. The engine had a patent bell-ringer, but this bell did not ring until a revolution of the wheel, and no bell was sounded before starting. But it seems conceded, that young Ostertag was crippled by the first revolution of the wheel. The car under which he was sitting was, perhaps, the third one in the train from Seventh Street, and the train consisted of twelve or thirteen cars, the elevation of the tressle gradually declining to the ground till it was level with it at the west end of the train, where the locomotive was attached. Whether the locomotive was attached when the boy went under the car, or subsequently, is left in doubt by the testimony, and it is not clear whether he could have seen it from his position or not. It is clear that the conductor who walked over the tops of the cars could not see a boy sitting under one of them. There was a good deal of evidence tending to establish the fact that boys were in the habit of gathering wheat left in the cars, or dropping from the wagons, and that the officers of the company prohibited it and directed their expulsion, but of course without effect.



The verdict was for the defendant, and the only ground upon which the judgment which followed it is assailed here, is, that the instructions were wrong. It is unnecessary therefore to set out the evidence in detail.

The court gave five instructions for the plaintiff and three for the defendant. These instructions were as follows :

No. 1. "The jury are instructed that although they may believe, from the evidence, that the son of plaintiffs was guilty of negligence or carelessness, which contributed to the injury, yet if they further believe, from the evidence, that the servants or agents of the defendant, managing the locomotive or cars of defendant, with which the injury was inflicted, might have avoided the said injury by the use of ordinary care and caution, the jury will find for plaintiffs."

No. 2. "The court instructs the jury that persons or corporations using dangerous machinery, or employing vehicles which are hazardous, and who know, or have good reason to know, that boys or other persons, having but limited capacity or discretion, are in close proximity to or near by said machinery or vehicles, the persons or corporations using them are bound to exercise a degree of caution and skill which would not otherwise be required; and if the jury believe, from the evidence, that the agents or employees of defendant, in charge of the locomotive or cars of defendant, knew, or had reason to know, that the son of plaintiffs was about or near to the same, the jury may consider this fact in determining the question of defendant's negligence."

No. 3. "The court instructs the jury that defendant is required to exercise the utmost care and greatest prudence in the operation of its engines and machinery, on account of the danger attending the use of the same; and if the jury believe from the evidence in this action, that the defendant's agents or servants whilst managing the locomotive or cars of defendant, as such agents or servants, failed to use such care and prudence, by which the injury was done to the son of plaintiffs, they should find for plaintiffs in this action."

No. 4. "The court instructs the jury that if they find for the plaintiffs they must assess their damages at the sum of five thou-

sand dollars, that being the amount to which plaintiffs are entitled by law, if the jury find a verdict for plaintiffs."

No. 5. "The jury are instructed that the son of plaintiffs was bound to exercise only such care and prudence as might reasonably be expected of a boy of his age and capacity under similar circumstances, and that the same degree of care and prudence in avoiding danger is not required from a person of tender years and imperfect discretion as from a person of mature years and greater discretion under similar circumstances; and if the jury believe, from the evidence, that the said son of plaintiffs was, at the time of the accident, of about the age of eleven years, they may take that fact into consideration in considering the question of negligence or carelessness on the part of said son."

Defendant's instructions given were: No. 1. "Even if the jury believe that the grounds ought to have been inclosed by gates, or other methods ought to have been adopted to exclude persons by force from the grounds, yet if they find that there was no negligence on the part of those managing the train, they must find for defendant."

No. 2: "Although the same degree of care is not required on the part of a child as is required of a grown person, yet, if the jury believe that the boy Ostertag either knew, or was of an age to know, that it was dangerous and unsafe to sit under the defendant's cars, he was required to avoid such dangerous and unsafe place, and if he failed to do so he was guilty of negligence."

No. 3. "The court instructs the jury that if the boy Ostertag was guilty of negligence directly and proximately contributing to his injury, the plaintiffs cannot recover."

The principal point relied on for reversing the judgment is, that in the second instruction given for the defendant the court assumed that to sit under the defendant's cars was a dangerous and unsafe place; that it ought to have been left to the jury to determine whether such act, on the part of the boy who was killed, was negligence or recklessness or not. The instruction was, that a child was not expected or required to exercise the same care as a grown person, and left it to the jury to determine whether young Ostertag knew, or had reason to know, that it was dan-

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gerous or unsafe to sit under the cars, and directed them, if they thought he knew, or was of an age to know, that such position was an unsafe one, that he was guilty of negligence. The objection is, that the instruction assumed as a matter of law that sitting on the tressle work under a car was an unsafe place.

The court had previously told the jury that no amount of negligence on the part of the boy would authorize the defendant's servants to kill him, if they were aware of his position, and the real question in the case was, whether due care was observed by the defendant. There are some things that a court may assume as negligence, such as a man's jumping from a car propelled by steam when in rapid motion, and taking a seat under a car at a station is certainly not a safe position. The cases of *Wyatt vs. Citizen's R. R. Co.*, (55 Mo. 489) and *R. R. Co. vs. Stout*, (17 Wall. 657) presented very different questions. In *Wyatt's* case the plaintiff jumped from a street car, propelled by horses, at the repeated solicitations and orders of the conductor, and in *Stout's* case the questions are entirely as to the proper care of the railroad company in regard to inclosing the turn table. In this case the court leave it to the jury to find whether young Ostertag was of an age to understand that his position was an unsafe one, or not. No one could doubt that it was hazardous. The facts in the case showed this, and it would have been useless to leave such a question to a jury. That it was so, all the evidence on both sides established. The death of the boy showed this, and the question of fact upon which the responsibility of the company depended was, whether the unfortunate occurrence could have been avoided by due care on their part.

The instructions, taken altogether, appear to us as a very fair presentation of the questions for the determination of the jury, and indeed we do not very well see how the jury could have found otherwise than they did. The accident was evidently the result of a singular degree of carelessness on the part of the boy, without, so far as the evidence shows, the least fault of the defendant's servants. That the boy was not observed by any of the superintendents or managers of the train is clear, and that the usual precautions of having a brakeman walk over the cars

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from one end of the train to the other was observed in this case, is proved by the testimony of the brakeman; but of course he could not see a person sitting under one of the cars, although a number of boys were in the habit of gathering wheat from the cars and wagons at this station, daily, and this fact was well known to the employees of defendant. It does not follow that the toleration of such depredations devolved additional duties on defendant's agents in moving their train. It seems likely that young Ostertag, who was sitting on the tressle with his face to the north, did not observe the locomotive at the west end of the long train—the track west inclining to the south. But there was nothing in the known habits of the boys who gathered wheat, to lead the conductors or managers of the freight train to examine underneath the cars, and the ringing of the bell was not with any view to apprise strangers, but, I suppose, altogether for the convenience of the employees of the company.

The death of young Ostertag was simply an unfortunate accident, for which the company was not responsible.

Judgment affirmed; the other judges concur.

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CRAVEN B. BURRIS, Respondent, *vs.* THOMAS B. NORTH, Appellant.

1. *Malicious prosecution—Probable cause—Advice of counsel need not be to prosecute—Malice, proof of not necessary, when.*—In an action for malicious prosecution if defendant show that he was advised by counsel that plaintiff was liable to the prosecution, he need not, in order to show "probable cause," go further and show that he was advised to bring the prosecution. And when so advised of his rights, proof of malice on his part will not render him liable.
2. *Malicious prosecution—Instruction—Proof of intent to protect family of defendant, etc.*—In suit for criminal prosecution, an instruction that in order to make out a case of probable cause, defendant was bound to show that he was actuated by a desire to protect his family, was held improperly given.
3. *Malicious prosecution—Action for, what essential to.*—To sustain an action for malicious prosecution, the want of probable cause and malice are both essential.

*Appeal from Franklin County Circuit Court.*

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*Davis, Thoroughman and Warren*, for Appellant, cited : Sharpe vs. Johnstone, 59 Mo. 575 ; Larch vs. Blackburn, 4 Carr. & Payne, 297 ; Hat vs. Wilkes, 3 Bam. & Ala. 304 ; 1 Wood & Mack, 505 ; S. C., 7 Taunt. 497.

*J. Halligan, with Henry Flanagan*, for Respondent, cited : Callahan vs. Cafferata, 39 Mo. 136 ; Casperson vs. Sproule, 39 Mo. 39 ; Miller vs. Brown, 3 Mo. 127, 131 ; 17 Wend. 496 ; 21 Wend. 407 ; 30 Conn. 121 ; Freidenheit vs. Edmonson, 36 Mo. 227 ; Wells vs. Sanger, 21 Mo. 354 ; Woodson vs. Scott, 20 Mo. 272 ; Fallenstein vs. Booth, 13 Mo. 427 ; Buckley vs. Knapp, 48 Mo. 152 ; 48 Mo. 164 ; Wagn. Stat. 462, § 55 ; 506, § 46 ; 456, § 25 ; Davis vs. Commonwealth, 17 Grat. 617 ; U. S. vs. Gideon, 1 Minn. 296 ; Hill vs. State, 43 Ala. 338 ; Woolf vs. Chalker, 31 Conn. 121 ; Brow vs. Carpenter, 26 Vt. 640 ; Loomis vs. Terry, 17 Wend. 496 ; Mackwell vs. Palmerston, 21 Wend. 407 ; Hill vs. Palm, 38 Mo. 13 ; Sappington vs. Watson, 50 Mo. 83 ; Wagn. Stat. 496, § 27

NORTON, Judge, delivered the opinion of the court.

This was an action for malicious prosecution instituted in the circuit court of Franklin county. The petition alleges that the defendant wilfully, maliciously, and without reasonable or probable cause, in February, 1871, caused and procured the arrest of plaintiff on two affidavits, made by defendant before a justice of the peace of said county, charging plaintiff with wilfully and maliciously killing a dog of defendant, and with wilfully disturbing the peace of the family of defendant ; that in consequence of said arrest he was imprisoned and restrained of his liberty in the county jail for the space of seven days.

The answer denied the allegations of the petition, and upon a trial plaintiff obtained a verdict and judgment, from which defendant has appealed.

The errors complained of are the admission of illegal evidence, the giving of improper and refusing of proper instructions.

All the instructions given on the part of plaintiff were objected to. We do not deem it necessary to consider them all, but shall

confine our attention to those only which we consider clearly erroneous. The tenth and eleventh instructions given on the part of plaintiff are as follows :

10. "Before defendant can avail himself of the advice of counsel as a defense in this case for the arrest and imprisonment of plaintiff, he must show to the satisfaction of the jury that he stated all the facts that he knew, and all that he, as a prudent and cautious man, should have known, to an attorney skilled in his profession, and that he was *advised* by said attorney to *institute* the *prosecution*, and that the prosecution, arrest and imprisonment of plaintiff were made in consequence of the advice of such attorney, and not in pursuance of a previous fixed determination to make such arrest."

11. "The court instructs the jury that the first affidavit read in evidence, made by defendant before Justice Karhsmann on the 13th day of February, 1871, charges no criminal offense against Burris, and that the only offense charged in the second affidavit made by the defendant on the day aforesaid, before Justice Karhsmann, against Burris, the plaintiff, was for a disturbance of the peace of the family of said North, and that to authorize a conviction under that charge it was necessary for the prosecution to prove that said Burris did wilfully disturb the peace of the family of said North, or some person of the family of said North, by loud and unusual noise, loud and offensive, or indecent conversation, or by threatening, quarreling, challenging or fighting ; and unless the jury shall find that there was probable cause for charging the plaintiff with the disturbance of the peace, as above defined, and that defendant North was actuated by a desire to protect his family from such wilful disturbance, and not moved by malice to prosecute said Burris, they will find for plaintiff."

The tenth instruction is erroneous in this, that it required the defendant to show that he "was advised by the attorney, whom he consulted, to institute the prosecution." Under this instruction, although the jury may have believed that defendant communicated to an attorney all the facts he knew, or all that he could, as a prudent and cautious man, have known, and that the attor-



ney thus consulted had advised him that the facts stated showed that plaintiff had committed a misdemeanor for which he could be prosecuted, yet, unless they believed the further fact that the attorney had advised the defendant to institute the prosecution, it would constitute no defense.

This point was expressly decided in the case of *Sharp vs. Johnston* (59 Mo. 558), where Judge Hough, speaking for the court, said, "that the instruction given by the court was erroneous in requiring the jury to find that the attorney, consulted by defendant, advised the prosecution."

"Counsel learned in the law are the proper advisers of men in doubtful circumstances, but honorable men cannot be expected to advise criminal prosecutions or to incite civil litigation. It is their business to advise only as to legal rights and liabilities arising from the facts stated to them by their clients, and such advice, when fairly and honestly obtained, exempts the party who acts upon it from the imputation of acting without probable cause."

The eleventh instruction also asserts an incorrect principle. Under its direction, although the jury might believe there was probable cause for defendant to charge the plaintiff with wilfully disturbing the peace of defendant's family, still they are required to find for plaintiff, unless they further believe that defendant was actuated in the prosecution by a desire to protect his family, and was not moved by malice. This, we think, was a misconception, and greatly calculated to mislead the jury. To sustain an action for malicious prosecution, the want of probable cause and malice are both essential. "They are distinct and essential ingredients of this private wrong. If there be reasonable or probable cause, no malice, however distinctly proved, will make defendant liable." (*Sharp vs. Johnston, supra.*)

The jury are also required, although they might believe there was probable cause for the prosecution, to find that defendant was actuated in the prosecution by a desire to protect his family.

The judgment will be reversed and the cause remanded. The other judges concur.

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Hicks v. The Pac. R. R. Co.

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**J. D. HICKS, Respondent, vs. THE PACIFIC RAILROAD COMPANY, Appellant.**

1. *Railroads—Injuries to child—Platform—Trespass—Contributory negligence—Liability of company, measure of.*—In suit against a railroad company for injuries to a child, it appeared that at a station where the accident occurred, by direction of his father the boy was in the habit of driving stock from the track before the arrival of trains, and would then seat himself on the platform of the station, and was accustomed to get on freight trains on their arrival, and ride to the switch; that the platform had been built by the company for the accommodation of passengers and persons having business with the road, and that the lad had been frequently told to keep off the platform; that while standing there he was struck and injured by a timber projecting from a freight car: *Held*, that the direction was under the circumstances merely admonitory and not imperative in such sense as to make him, by reason of the order, a trespasser; that his having no right or business there did not constitute him a trespasser, and his being there was not such negligence as in law to contribute directly to his injury; that even supposing the child were a trespasser, the liability of the company to him for injuries would not be restricted to those which were wanton, but would embrace all such as resulted from want of ordinary care.
2. *Railroads—Risks in running past stations, etc.—Caution required.*—The care and caution required of railroad companies in running their trains are commensurate with the danger to persons and property incident to that mode of conveyance; and in running through towns and cities and over public crossings, or in the vicinity of railroad stations, they must exercise care and caution commensurate with the risks of accidents at such places.

*Appeal from Jackson County Circuit Court.*

*E. A. Anderson & Thos. J. Portis*, for Appellant, cited and commented on: 59 Penn. St., 129; 18 C. B. 46; 7 Met., 596; 12 Id. 485; 31 Vt. 79; *Beadle vs. Eastern Counties R. R. Co.*, 2 C. B. N. S., 509; *Case vs. Storer*, 4 Exch., 31, 319; *Warfell vs. The South Wales R. R. Co.*, 8 C. B. N. S., 525, 534, (E. C. L. R., vol. 98); *Boleh vs. Smith*, 7 Hurl. & Nor., 736 (1862), affirming *Hounsell vs. Smyth*, 7 C. B. N. S., 731 (E. C. L. R., vol. 97); *Smith vs. St. Joe*, 45 Mo. 449; *Barker vs. Midland Rly. Co.*, 18 C. B. 58 (E. C. L. R., vol. 86); *Winterbottom vs. Wright*, 10 M. & W., 109; *Sweeney vs. Old Colony and Newport R. R. Co.*, 10 Allen, 368; *Gautret vs. Egerton*, 2 Com. Pleas, 374, (1867); *Stone vs. Jackson*, 16 C. B., 199 (E. C. L. R., vol. 81); *Corby vs. Hill*, 4 C. B. (N. S.), 558,

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(E. C. L. R., vol. 93); *Stout vs. R. R. Co.*, 17 Wall. 657; See 8 Am. Law Reg., [U. S.], 737, *note*; *Brown vs. Han. & St. Joe. R. R. Co.*, 50 Mo. 461; *Dean vs. Clayton*, 2 E. C. L. 461, S. C., 7 Taun. 489; *Wilson vs. Brett*, 11 M. & W. 113; *Robinson vs. Cone*, 22 Vt. 213; *Johnson vs. Patterson*, 14 Conn. 1; *Birge vs. Gardiner*, 19 Conn. 507; *Dixon vs. Bell*, 1 Clark, 287-289; *Lynch vs. Nurdin*, 1 Ad. & Ell. N. S. 29, 38, 9 (41 E. C. L., 422, 426); *Vanderplank vs. Miller*, 1 Moo. & Malk. 169 (22 E. C. L., 280); *Pluckwell vs. Wilson*, 5 Car. & P. 375 (24 E. C. L., 368); *Luxford vs. Large*, 5 Car. & P. 421 (24 E. C. L. 391); *Williams vs. Holland*, 6 Car. & P., 23 (25 E. C. L. 261); *Woolf vs. Beard*, 8 Car. & Pa., 373 (34 E. C. L., 435); 2 *Stephens*, N. P., 10, 18; *Rathborn vs. Payne*, 19 Wend. 399; *Cincinnati, Hamilton & Dayton R. R. Co. vs. Waterson & Kirk*, 4 Ohio St., 424; *New Haven St. & Trans. Co. vs. Vanderbilt*, 16 Conn. 420; *Sills vs. Brown*, 9 Car. and P. 601 (38 E. C. L.), 245; *Vere vs. Lord Cawdor*, 11 East., 568; *Wadhurst vs. Damane*, Cro. Jac., 45; *Barrington vs. Turner*, 3 Lev. 28; *Mayor of Colchester vs. Brooks*, 7 Ad. & El., (53 E. C. L., 369); *Davies vs. Mann*, 10 M. & W., 546; *Karle vs. K. C., St. Jo. & C. B. R. R. Co.*, 55 Mo. 484; *Isabel vs. H. & St. J. R. R. Co.*, 60 Mo. 482; *Maher vs. P. R. R. ante*, p. 367; *Keefe vs. Milwaukee & St. P. R. R. Co.*, 2 Cent. Law Jour. (March 12th, 1875), 170; *Stout vs. Sioux City R. R. Co.*, 2 Dil. 294; *Holmes vs. N. E. R. R. Co.*, 4 Exch., 254; *Gillis vs. R. R. Co.*, Law Reg., 729, *note*.

*James K. Shelby*, for Respondent, cited: *Stout vs. Sioux City & P. R. R. Co.*, 2 Dil. 294; *Keefe vs. The Milwaukee & St. Paul R. R. Co.*, Centr. Law Journ., March 12, 1875; *C. & A. R. R. Co. vs. Garvy*, Adm'r, 58 Ill. 83; *Isabel vs. Hann. & St. Joe. R. R. Co.*, 60 Mo. 481; *Doss vs. Mo. Kas. & Texas R. R.*, 59 Mo. 27; *R. R. Co. vs. Stout*, 17 Wall. 657.

HENRY, Judge, delivered the opinion of the court.

This was an action by plaintiff to recover against defendant damages for a personal injury received under the following circumstances:

Plaintiff, at the time of the injury, was between twelve and fourteen years of age. On the evening of August, 1872, plaintiff was at defendant's platform at Lee's Summit, in Jackson county, when a freight train from the east came in on defendant's road.

It was about dusk, and a piece of timber with which one of the cars was loaded, projecting over the side of the car from twenty inches to two feet, struck plaintiff and broke his nose and otherwise injured him.

The plaintiff testified that he was about the middle of the platform when struck. Another witness testified that he (witness) stood in the middle of the platform when the car passed him, and was not hit by it. There was uncontradicted evidence that the agents of the company had repeatedly told plaintiff to keep off the platform. His father lived near the depot, and this boy and others were in the habit of going there when trains arrived, and jumping on the freight trains for a ride. He had no business there that evening. He was sent to the road by his father about half an hour before the arrival of this train to drive some of his hogs off of the track, and the evidence was that he would drive the hogs a short distance from the track and then take a seat on the end of the platform.

The train came in on the main track, and the platform adjoined this track. The evidence shows that between Pleasant Hill and Lee's Summit, a distance of twelve miles, there are five bridges, the last one about four miles east of Lee's Summit. This bridge is twelve feet and nine inches clear on the inside; cars are nine feet wide. At Pleasant Hill the cars were inspected and no projecting timber seen, and not until the plaintiff was injured was it known that the timber was projecting.

The platform was built by the defendant for the accommodation of passengers getting on and off its trains, and of such persons as had business with defendant at its depot.

The court, of its own motion, refusing six asked by defendant, gave the following instructions:

1. "If the jury find from the evidence that the platform, upon which the plaintiff was standing when injured, was the place used

by persons on entering and leaving the cars of defendant at Lee's Summit, and also for receiving and discharging freight, and that prior to that time, with the assent of defendant, persons not having business with the defendant were in the habit of standing on said platform, upon the arrival and departure of the trains of defendant, and that plaintiff, while standing on said platform, was struck by a stick of timber loaded on one of the cars of defendant, and projecting from the side of the car over said platform, or a part of it, and that the projection of said stick of timber was dangerous to persons standing on said platform, and was not loaded on said car in the usual manner, and no warning was given, to persons standing on said platform, by any employe of defendant of the danger of said projecting stick of timber; and if you further find from the evidence, that said plaintiff was not guilty of negligence, on his part, which contributed directly to the injury he received, then the jury will find for the plaintiff, and assess his damages at such a sum as you may believe from the evidence he has sustained, not exceeding the amount claimed in the petition.

"But if the jury shall believe from the evidence that the stick of timber, which occasioned the injury to plaintiff, worked out of its proper place on the side of defendant's cars, by accident and without the fault of the employees of defendant, and its condition was unknown to the conductor of the train, or other employees of defendant on said train, and could not, by the use of ordinary care on the part of the employees of defendant on said train, have been discovered, and if the jury further find that said car was loaded in the usual way, then your finding will be for the defendant.

"Or, if you should find that the injury complained of was caused by the negligence of the plaintiff contributing directly to produce said injury, then your verdict will be for the defendant.

"Or, if you shall find that the plaintiff, prior to the time he was injured, had been in the habit, with others, of getting on the trains of the defendant while approaching said depot, for the pur-

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pose of riding thereon upon switch of defendant, and that plaintiff had been warned by the employees of defendant against the danger of their getting on the trains of defendant, and if you shall further find that, at the time plaintiff was injured, he was endeavoring to get on the train of defendant, and in doing so was injured, and was thus guilty of negligence which contributed directly to produce the injury he received, then your finding will be for defendant."

There was a verdict for plaintiff for twenty-one hundred dollars.

A motion for a new trial was filed by the defendant, and plaintiff remitting nine hundred dollars of the amount found by the jury, the court overruled the motion for a new trial and entered a judgment for plaintiff for twelve hundred dollars, from which defendant appealed.

The right of plaintiff to recover in this case does not depend upon the principle of law applicable to the case of a passenger or one who has procured a ticket to go as a passenger upon the train, who is injured while on, or getting off or on the train. The plaintiff was not a passenger, nor was he there to become such, nor had he any business with the defendant or any one else which required him to go on the defendant's platform. He had no right to be on the platform in the strict sense of the word, but was there by sufferance. Yet he was not a trespasser, and his being there was not such a negligence as the law recognizes as contributing directly to the injury. The evidence that plaintiff had been in the habit of going to the depot on arrival of trains, and getting on freight trains for a ride on the switch, and that he had been warned of the danger, and told by defendant to keep off of the platform, we do not regard as an imperative order; but, under the circumstances, as only advisory, and not making plaintiff a trespasser when he went on the platform.

In *Giles vs. the Penn. Railroad Co.* (59 Penn. 129), it was held, and we think correctly, that "the platform of a railroad company, at its station or stopping place, is in no sense a public highway. There is no dedication to public use as such. It is a



structure erected expressly for the accommodation of passengers arriving and departing on the train."

That was a case of injury received by one from the falling of a platform at a railroad station where a large concourse of people had assembled to see Andrew Johnson, and the distinguished gentlemen who accompanied him, when he visited the west while President of the United States.

The court further observed in that case: "The plaintiff may not have been technically a trespasser. The platform was open; there was a general license to pass over it. But he was where he had no legal right to be; his presence there was in no way connected with the purposes for which the platform was constructed. Had it been the hour for the arrival or departure of a train, and he had gone there to welcome a coming or speed a parting guest, it might very well be contended that he was there by authority of defendant, as much as if he was actually a passenger, and it would then matter not how unusual might have been the crowd, the defendant would have been responsible. As to all such persons; to whom they stood in such a relation as required care on their part, they were bound to have the structure strong enough to bear all who should stand on it. *As to all others, they were liable only for wanton injury.*" The judge who delivered the decision in that case, it will be seen, in a mere *dictum* however, occupied the extreme ground in favor of railroad companies, holding that one going upon a platform of a company, without having any business there, cannot recover for an injury received in consequence of the carelessness or negligence of the employees of the company, but only for injury *wantonly inflicted*. If that be the law, the judgment in this case cannot stand. We think that the conclusion of the court in that case was correct, and the argument to show that defendant was not liable on the facts proven is unanswerable, but the doctrine announced in that portion of the paragraph we have quoted and italicized we do not think sustained by authority.

In *Commonwealth vs. Power* (7 Met. 600), it was held that the opening of depots and platforms for the sale of tickets, for the assembling of persons going to take passage or landing from the

cars, amounts in law to a license to all persons, *prima facie* to enter the depot, and that such entry is not a trespass, but that it is a license conditional, subject to reasonable and useful regulations; and on non-compliance with such regulations, the license is revocable, and may be revoked, either as to an individual or as to a class of individuals, by actual or constructive notice to that effect.

In *Kerwhacker vs. C. C. & C. R. R. Co.* (3 Ohio 175), Bartley, Judge, delivering the opinion of the court, says, that "a maxim of law, tested by the wisdom of centuries, exacts of every person, in the enjoyment of his property, the duty of so using his own as not to injure the property of his neighbor. Hence the general rule, that in all cases where damage occurs to another, by the negligence or improper conduct of a person in the exercise of his particular trade or business, an action is maintainable. How far this doctrine is applicable to railroad companies, in the exercise of their peculiar business, is the question presented before us."

That was an action against a railroad company for killing hogs that were on the track and run over by a train. It was not a right of the owner to have his hogs on the track, although he had a right to let them run out.

The court below refused to instruct that if defendant's agents could, in the use of ordinary care, have easily and safely avoided the destruction of the property, by checking the speed of the train, the defendant was liable, but instructed that as the hogs were improperly on the railroad, the defendant's agents were not bound to check the ordinary and usual speed of the cars, or use any means or caution to save plaintiff's property. The court held that "the position taken by the court below, assuming the animals to have been unlawfully on the road, would justify not only a wanton disregard of the plaintiff's property, but even an intentional destruction of it by defendant's agents, providing it occurs while running the train over the railroad in the ordinary way and at the usual speed."

A person walking on the track of a railroad, at other points than a public crossing, is a trespasser; and yet it has never been

held in this State that the company is only liable for wanton injuries inflicted upon him by its employees; but this court has uniformly held, that if injured or killed under those circumstances by the negligence of the employees of the company running the train, he or his representatives may recover. It was so held in *Isabel vs. Han. & St. Jo. R. R. Co.*, 60 Mo. 480. The instruction given by the court below, and objected to by defendant, was, that "though Isabel had no right to be on the track of defendant's railroad, yet the fact that he was upon their property did not discharge them from the observance of due care towards him; nor did it give the defendants, nor their employees, any right to run over him, if that could have been avoided by the exercise of ordinary care and watchfulness."

Wagner, J., who delivered the opinion of the court, said: "There can be no objection urged against the instruction—no doctrine is better established in this State than the principle it enunciates."

The case of *Maier vs. Pacific R. R. Co.* is to the same effect, as are all the cases decided by this court growing out of injuries received from a running train by persons on the track of the road. We are not aware that any court in this country or in England has held that in such cases the company is only liable for injury wantonly inflicted by defendant.

What distinguishes the case at bar, in principle, from those cases? Even admitting that plaintiff was a trespasser, when on the platform, he was no more a trespasser than one on the track of the company, and the same principle of law governs both cases. The argument of defendant's counsel would only hold the company liable in a case where the conductor of the train would be held guilty of murder or manslaughter in one of the degrees, and we think he is not supported by the decision of any superior court in this country or in England.

"In *Isabel vs. Han. & St. Jo. R. R. Co.*, *supra*, the court says our decisions have been uniform; that, although a person may be improperly or unlawfully on the track of a railroad, still the fact will not discharge the company or its employees from the observance of due care, and they have no right to run over and

kill him, if they could have avoided the accident by the exercise of ordinary caution or watchfulness."

Does the instruction given by the court below conflict with these views? It hypothecates the right of plaintiff to recover upon the following facts to be found by the jury: that the platform was the place used by persons on entering and leaving the cars, and for receiving and discharging freight; that prior to that time, with the assent of defendant, persons not having business with defendant were in the habit of standing on said platform upon the arrival and departure of the trains; that plaintiff, while standing on said platform, was struck by a stick of timber loaded on one of the cars and projecting from the side of the car, over the platform, or a part of it; that the projection of said timber was dangerous to persons on said platform; that no warning was given by any employee of defendant of said danger, and that said plaintiff was not guilty of negligence which contributed directly to the injury he received. They were further instructed that if the stick of timber worked out of its proper place by accident, and without the fault of defendant's employees, and its condition was unknown to defendant's employees on said train, and by the use of ordinary care, could not have been discovered, and that the car was loaded in the usual way, the plaintiff could not recover. A higher degree of care is required of a railroad company in regard to passengers getting on or off a train at its depot, than they are held to, as to persons there merely to gratify curiosity; but we cannot subscribe to the doctrine, that even as to a trespasser on the platform any more than a trespasser on the track of the company, it is only liable for wanton or intentional injuries to persons so trespassing.

In the case of *Birge vs. Gardiner* (19 Conn. 507), which was an action against defendant for negligently placing and leaving a heavy gate so that plaintiff, a child under seven years of age, was badly injured by its falling upon him, *Church, C. J.*, said: "We do not decide whether, in this case, the plaintiff was a trespasser or not. There are many acts, deemed acts of trespass, which involve civil liability, where there is no fault, and on the ground that where one of two innocent parties must suffer, he who is the

proximate cause of the injury must be responsible for it. But this is not a case between faultless parties. The gross negligence of the defendant is here the cause of action, and he alone is responsible for the entire consequence of it, unless there has been *fault* on the part of plaintiff."

In that case the gate was on defendant's premises, and plaintiff put his hand upon and shook it, when it fell upon him; yet he recovered a judgment, which was affirmed in the Supreme Court of Errors. The cases cited to show that where one permits another to go on or over his premises, the former is not liable to the latter for injuries received from falling into a pit, which had been left open on the premises, and similar accidents are not in point.

If one go upon the railroad track at a point where he has no right to be, and be injured by falling into a ditch which the company had left open, or in consequence of a broken rail on the track, the liability of the company would be determined by the same principle which governs in the class of cases cited. Their duty to keep their track in repair is not a duty to trespassers on the track, and they cannot recover damages for neglect of such duty. Or if one should drive a team on the right of way, and fall into a pit or ditch left open by the company, at a point on the right of way where plaintiff was not invited but only permitted to go, those cases would be applicable; but the case at bar rests upon different principles.

"A direct liability exists in all cases *where personal injuries* have been sustained by the neglect of duties which are of a general and public character, and where the observance of those duties is required as a matter of public security and safety." (23 Vt. 378.)

The care and caution required of railroad companies in running their trains, are commensurate with the danger to persons and property incident to that mode of transporting freight and passengers, and at some points on the road greater care is exacted than at others. In running through towns and cities, and over public crossings, they are expected to be more careful than at other places where not so likely to injure persons or property.

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In approaching stopping places where people are in the habit, for business or pleasure, of congregating, they must exercise the care and prudence which a proper regard for human life dictates, and to hold that a railroad company is only liable for wanton injury in such a case as we are considering, would encourage recklessness in the running and managing of trains, which would be intolerable. These companies not only owe a duty to passengers and others lawfully on their tracks and platforms, but a duty to the public to exercise the rights conferred upon them, with a due regard to the safety of all persons and property.

An instruction was asked by defendant to the effect that the burden of proof was on plaintiff to establish the facts, naming them, which rendered it liable to plaintiff. The instruction given by the court does not use those words, but substantially so instructed by declaring that plaintiff's right to recover depended upon the proof of those facts.

The instruction given, we think, was a remarkably clear declaration of the law, and presented the case with perfect fairness to the jury.

The judgment is affirmed. All the judges concur, except Sherwood, C. J., absent, and Judge Hough not sitting.

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A. CLARK, Respondent, *vs.* ST. LOUIS, KANSAS CITY, AND  
NORTHERN RAILWAY COMPANY, Appellant.

1. *Common carrier—Action against for failure to deliver stock—Special contract—Common law obligation and liability of carrier—Petition before justice, what sufficient.*—A common carrier cannot, by a special contract relating to the transportation of stock, defeat an action in *tort* for their own delivery, based on his common law obligation to use due diligence in transportation of the same. The liability of defendant in such case does not arise upon contract, but in spite of it. And in such case plaintiff's petition before a justice, stating the delivery of the stock to the carrier, his undertaking to transport and failure to deliver them at their destination, their value and the loss, although irregular, is substantially in the form of an action *ex delicto* founded in *tort*.
2. *Instructions—Evidence, refusal of.*—Instructions abstractly correct, but not founded on the evidence, should be refused.



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3. *Action against—Declaration—Carriers—Special contract need not be set out in, when.*—In cases where there is a special contract with the carrier, by which the common law liability is restricted, and the action is in form *ex contractu*, it seems that the special contract must be set out in the declaration; but where the action is in *tort* for the breach of a duty or obligation imposed by law, it is unnecessary to notice the special contract, although it may be under seal.
4. *Common carrier—Transportation of stock—Negligence—Burden of proof on owner, when.*—Where the owner contracts to load and unload his stock, and to take charge of them during their transportation, and does in fact do so, the burden of proof, when the company is charged with negligence, for the loss or injury to the stock, is upon the owner.

*Appeal from Jackson County Special Law and Equity Court.*

*W. H. Blodgett*, for Appellant.

I. An action cannot be maintained upon an implied contract, when there is an express contract subsisting between the parties in relation to the subject matter of the action, the express contract between the parties being entirely different in its terms from the contract implied by law. (Ang. Car., §§ 46, 54.)

Where an action is brought against one upon his implied undertaking as a common carrier, and the evidence shows that the defendant did not undertake the transportation of the goods as a common carrier, but as a private carrier, under the terms of a special contract, plaintiff cannot recover. For if the defendant stands in the position of a private carrier for hire, it is right that he should be permitted to make such defense as will exonerate him under his contract as a private carrier. (Merle vs. Hascall, 10 Mo. 409; Christy vs. Price, 7 Mo. 433; Murphy vs. Wilson, 44 Mo. 316; Jones vs. Lauderman, 39 Mo. 290; Harris vs. Han. & St. Joe. R. R., 37 Mo. 307; Davidson vs. Graham, 2 Ohio St. 122; Chambers vs. King, 7 Mo. 517.)

II. Suits commenced before justices of the peace, as well as suits commenced in courts of record, must be founded on the real cause of action existing between the parties. (Wagn. Stat. 850, § 18; Hausberger vs. Pac. R. R. Co., 43 Mo. 196.)

III. "If the owner of the goods in the hands of a private carrier accompanies the goods to take care of them, and is himself

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guilty of negligence by which the goods are lost, or if there is as much reason to attribute the loss to the negligence of one party as the other, the carrier is not liable." (Ang. Car. § 57.) Where such are the facts, the burden of proof is not upon the defendant. (Louisville, C. & L. R. R. Co. vs. Hedger, Am. Law Reg. 1875, p. 149.)

*S. P. Twiss*, for Appellant, cited further: Ang. Com. Car. [4 Ed.], §§ 17-45, and notes; Lake Shore & Mich. South. R. R. vs. Perkins, 25 Mich. 329; Cragin vs. The New York Cent. R. R. Co. 51 N. Y., 61; Kimball vs. Rutl. & Burl. R. R., 26 Vt. 247; Ketchum vs. Am. Mer. Un. Ex. Co., 52 Mo. 390; Moriarty vs. Harnden's Ex., 1 Daly, [N. Y.] 227; Iron Mt. Bk. of St. L. vs. Murdock, 62 Mo. 70.

*Ballingal & Gwynne*, for Respondent.

I. Plaintiff's cause of action was properly stated in his written complaint filed with the justice of the peace, before whom this cause was originally instituted. It was of such a character as to fully apprise defendant of the nature and purport of plaintiff's claim. This the law holds to be sufficient. (Quinn vs. Stout, 31 Mo. 160; Iba vs. Han. & St. Joe. R. R. Co., 45 Mo. 469.)

II. The plaintiff's writ was based upon the "common law" liability of defendant arising from its character as a "common carrier." "Negligence" was the gist of the action, and not the violation of any written stipulation contained in the contract for shipment.

The plaintiff proved that he delivered the hogs in controversy to defendant, that defendant received them for transportation, and that defendant had failed to account for the same. This much was amply sufficient to make out the plaintiff's case. After the introduction of this evidence the burden of proof was upon the defendant to show its exemption from liability on account of either the "act of God, or public enemies," or that it was specially exempted from such liability, by contract with plaintiff. But the plaintiff went further, and proved negligence—wilful negligence—on the part of the defendant, The "com-

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mon carrier" may, by contract, exempt himself from liability as an insurer against "accident" or "mistake," but not against even slight negligence. (*Levering vs. Union Trans. & Ins. Co.*, 42 Mo. 88; *Wolf vs. Am. Ex. Co.*, 43 Mo. 421; *Ketchum vs. Am. Merch. Union Ex. Co.*, 52 Mo. 390; *Read vs. St. L., K. C. & N. R. R.*, 60 Mo. 199; *Michigan Southern & Northern Ind. R. R. Co. vs. Heston*, 37 Ind. 448; *N. Y. Cent. & H. R. R. R. Co. vs. Lockwood*, 17 Wal. [S. C. W. S.] 357.)

The whole record shows that defendant was a "common carrier of live stock" for hire. It agreed to transport plaintiff's property, live stock, for \$40.00 per car. By its said agreement and reception of the property, it is estopped from denying the character it voluntarily assumed. This is the general rule of law. (*Chouteau vs. Goddin*, 39 Mo. 229; *Garnhart vs. Finney*, 40 Mo. 449.)

NAPTON, Judge, delivered the opinion of the court.

The action in this case originated before a justice of the peace, and was for the recovery of damages alleged to have been occasioned by the loss of some hogs shipped on the freight cars of the defendant.

The petition filed with the justice stated that the plaintiff delivered to the defendant, a common carrier, one hundred and two hogs, which the defendant undertook to convey from Harlem to St. Louis; that only eighty-five hogs were delivered at St. Louis; that seventeen hogs were not delivered, worth ten dollars and thirteen cents each, making in all the sum of one hundred and seventy-two dollars and twenty cents, for which amount plaintiff sues.

Judgment by default was rendered by the justice against the defendant, from which an appeal was taken to the special law and equity court of Jackson county.

Upon the trial in the appellate court the defendant insisted that the statement of facts before the justice was insufficient, but the court overruled this objection, and the plaintiff proceeded with his evidence. It appeared in the course of this testimony,

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that the hogs were shipped under a written contract, which was as follows:

"S. L., K. C. & N. R. R. Co.

Kansas City Station,

September 23d, 1872."

"Memorandum of an agreement made and concluded this day by and between the North Missouri Railroad Company of the first part, by the station agent at the above named station, and A. Clark of the second part, witnesseth, that whereas the North Missouri Railroad Company transports cattle, hogs, horses, pigs, sheep, lambs, calves or other live stock at the rate of \$40 per car load, or—cents per one hundred pounds, and advanced charges and other valuable considerations, the said party of the second part does in consideration thereof hereby agree to take the risk of injuries which the animals, or either of them, may receive in consequence of any of them being wild, unruly, weak, escaping, or maiming each other, or from delays, or in *consequence* of any hurt, suffocation or other effects of being crowded in the cars, or on account of being injured by the burning of hay or straw, or any other material used by the owner for feeding stock or otherwise, and for any damages occasioned thereby, and also all risks for damages which may be sustained by reason of any delay in such transportation, *and that he will see to it that the cattle, etc., are securely placed in the cars furnished, and that the cars are properly and safely fastened, so as to prevent the escape of live stock therefrom*, and it is further agreed between the parties that the first party shall in no case be held liable for damages to stock shippers under this contract in a greater sum than \$200 for each horse, \$100 for each cow, bull or ox, \$50 for each sheep, calf or other animal; and it is further agreed that the said party of the second part is to load and unload said stock at his own risk, the North Missouri Railroad Company furnishing co-laborers to assist, who will be subject to the orders of the owner or his agent while in that service, and that the said party of the second part who will also assume all risk for damage or injury to, or escape of the live stock, which may happen to them while in the stock yards awaiting shipment, and that the said

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second party will assume the charge of feeding and watering and taking care of the stock enumerated herein, at his own expense and risk, while the same is in the stock yards of the first party awaiting shipment aboard the cars; and it is further agreed between the parties hereto, that the person or persons riding free to take charge of the stock do so at their own risk of personal injury, from whatever cause, and that the said person shall sign the indorsement on the back of this agreement; and this agreement further witnesseth that the said party of the second part has this day delivered to said North Missouri Railroad company two cars of hogs (one hundred more or less), to be transported to St. Louis station, on the conditions above expressed.

"S. P. Brown, Station Agent.

"A. Clark."

The plaintiff's evidence tended to show that the hogs were put into two cars, and that before the owner had time to close the door of the car the train started, and that he informed the conductor of that fact. He got into the caboose at Harlem and did not get out until he reached the R. & L. Junction, about sixty miles from there, at which point he observed that the door was closed. The seventeen hogs were missing at St. Louis.

Upon the introduction of the special contract, the court was asked to declare the law that the plaintiff could not recover, but the court refused to so declare, and gave the following instructions to the jury:

1. "All that is necessary to charge the defendant, who is a common carrier, is to prove the delivery of the hogs to defendant to be carried, and the burden of accounting for the hogs is then upon the defendant."

2. "The burden of proof is on the defendant to show that the hogs were not lost by any want of care or skill and diligence on the part of defendant or its employees."

3. "The defendant is liable for any loss occasioned by the negligence of its agents."

4. "If the hogs might have all been delivered at St. Louis by due and proper care of defendant or its employees, then defendant is liable for the loss."

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5. "If defendant would exonerate itself from liability, it must either show the safe delivery of the hogs, or prove the loss occasioned by one of the causes excepted in its undertaking."

The verdict and judgment were for the plaintiff.

The point in regard to a variance, though of little practical importance, has been urged in this court with apparent confidence, and assumed to be based upon prior decisions of this court, which recognize the necessity of suing upon a special contract which supersedes an implied one.

At common law an action against a common carrier might be either in case, for a breach of duty, or in assumpsit based upon the implied contract. It is stated, that for four hundred years the usual declaration was in *tort* based upon the custom of the realm, and Mr. Angell, in his treatise on the law of carriers, particularly points out the advantages and disadvantages of either form of action. Lord Littledale observes, in *Burnett vs. Lynch* (5 B. & C. 609), that "where, from a given state of facts, the law raised a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, then, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded in *tort* is the more proper form of action, in which the plaintiff, in his declaration, states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach. For that is the most accurate description of the real cause of action, and that form of action in which the real cause of action is most accurately described is the best adapted to every case."

In cases where there is a special contract with the carrier, by which the common law liability is restricted, and the action is in form *ex contractu*, it seems to be settled by the authorities that the special contract must be set out in the declaration; but where the action is in *tort* for the breach of a duty or obligation imposed by law, it is unnecessary to notice the special contract, although it may be under seal. Thus, in *Kenlyside vs. Thornton* (2 Blacks. Rep 1111), an action on the case for waste was maintained against the tenant, although covenant on the deed of



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lease might also have been brought. And in *Burnett vs. Lynch* (5 B. & C. 589) an action on the case founded in *tort*, for neglect to perform covenant in a lease, was sustained by the court of King's Bench. Chief Justice Abbott observes, that "it by no means follows, that because a promise may be implied by law, this action on the case, which is in terms founded on the breach of that duty from which the law implies a promise, may not also be maintainable."

Mr. Angell observes in his treatise on the Law of Carriers, that in an action on the case against a common carrier, it is not necessary to state what his duty was, it being sufficient to state that he is a common carrier, the delivery of the goods, and their loss through negligence. It is for the defendant to set up the special contract, where there is any. (*Partington vs. South Water R. R. Co.*, 1 H. & N. [Exch.], 392.)

It seems to be settled, in this State at least, that a common carrier cannot relieve himself by special contract from the responsibility which he incurs at common law, for the exercise of due diligence. A diversity of opinion has prevailed as to the degree of negligence for which he shall be held responsible, but in this State he is required to exercise the highest degree of care exacted by the common law. (*Michigan S. & N. I. R. R. vs. Heaton*, 37 Ind. 448; *New World vs. King*, 16 Hen. W. S. 469; *Welsh vs. P., F. W. & K. R. R.*, 10 Ohio, 65.)

The action in this case is based upon the common law responsibility of the carrier for negligence from which no special contract could relieve him. The liability of the defendant does not arise from a special contract, but in despite of it. It is not based upon contract either expressed or implied, but upon a neglect of a public duty. The form of the complaint before the justice is not in exact accordance with such as are required in actions on the case, in a court where formal pleadings are required, but it may be considered as substantially an action *ex delicto* or founded in *tort*.

The case of *Davidson vs. Graham* (2 Ohio St. 131), and *Camp vs. Hartford and New York Steamboat Company*, decided by the Supreme Court of Errors of Connecticut in 1876 (3 L. &

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E. Rep. No. 17), are actions of assumpsit, and, therefore, not applicable to this case. The court below, therefore, properly ruled that there was no variance.

The instructions given by the court are abstractly correct, but not applicable to the facts in evidence. They do not call the attention of the jury sufficiently to the duty devolved on the plaintiff under his special contract of taking care of the stock and seeing that they were securely placed in the cars. The owner obligated himself to see that the cars were safely and properly fastened, so as to prevent the escape of the hogs. It appears from his own statement that this was not done, but he excuses himself by saying that the train started before he had an opportunity of shutting the doors. As the special contract imposed on the plaintiff this duty, it should have been left to the jury to determine whether the escape of the hogs was owing to the negligence of the plaintiff, or of the defendant's servants. And the burden of proving this negligence on the part of the defendant was, by the special contract, thrown upon the plaintiff.

In *Louisville L. & R. R. Co. vs. Wedger* (Am. Law Reg. for 1874, p. 149), which was a case where the contract was similar to the present, the Kentucky court of appeals observed: "When the owner contracts to load and unload his stock, and to take charge of them during their transportation, and does in fact do so, the burden of proof, when the company is charged with negligence for the loss or injury to the stock, is upon the owner, as the party who has the care of the property is presumed to know how the injury occurred, and must himself suffer the loss, unless negligence is shown on the part of the carrier or his employees."

The decisive question in this case was, whether the admitted neglect of duty on the part of the owner was occasioned by the acts of the defendant's officers, or was the result of his own negligence. It devolved upon the plaintiff to show that he was prevented from closing the doors of the cars by the acts of defendant or its agents, and that he did everything in his power to see to the fastening of the cars.

The judgment is reversed and the cause remanded. The other judges concur, except Sherwood, C. J., who is absent.

GEORGE CRESS, Respondent, *vs.* E. A. BLODGETT, Appellant.

1. *Contracts—Consideration moving to third person, etc.*—It is now the settled law in this State and elsewhere, that a promise made to one, for a valuable consideration, moving from him to another who agrees to pay a sum of money to a third person, will support an action by the latter.
2. *Vendor and purchaser—Dependent and independent covenants—Consideration moving to third party.*—Where A. covenanted to convey to B. by deed of warranty a tract of land, in consideration that B. should assume a mortgage on the land and give his note for a balance due from A. to C., and B. permits the property to be sold under the mortgage to a third party, it is not necessary, in order to entitle C. to recover on his note against B., to deliver to the latter a deed to the land from A. The payment by B. of the mortgage note and discharge thereby of the liens were a condition precedent to his right to the deed.

*Appeal from Johnson County Circuit Court.*

*Waters & Winslow*, for Appellant, cited: *Logan vs. Tibbett*, 4 Greene, [Iowa] 389; *Pillow vs. Brown*, 26 Ark. 240; *Edgell vs. Tucker*, 40 Mo. 526; 2 Pars. Contr., p. 529; *Bank of Columbia vs. Hajner*, 1 Pet. 465; *Freeland vs. Mitchell*, 8 Mo. 487; *Cunningham vs. Morrell*, 10 Johns. 203; *Wadlington vs. Hill*, 10 S. & M. [Miss.] 560; *Pegues vs. Moby*, 7 S. & M. [15 Miss.] 340; *Liddell vs. Sims*, 9 S. & M. [17 Miss.] 612; *Doe vs. Thompson*, 2 Foster [N. H.] 217; *Wellman vs. Dismukes*, 42 Mo. 101; *Dietrich vs. Franz*, 47 Mo. 85; *Hunt vs. Livermore*, 5 Pick. [Mass.] 395; *Kane vs. Hord*, 13 Pick. [Mass.] 281; *Denny vs. Kile*, 16 Mo. 451; *Johnson vs. Wygant*, 11 Wend. 48; *Kaye vs. Dutton*, 7 M. & G. 307; 2 Am. Lead. Cases [4 ed.,] pp. 185, 200, 201, 202, 242, 243.

*A. B. Jetmore*, for Respondent, cited: *Rogers vs. Gosnell*, 58 Mo. 589; *Tate vs. Barcroft*, 1 Mo. 163; *Dube vs. Smith*, Id. 313; *Wear vs. McCorkle*, Id. 588; *Wathen vs. English*, Id. 746; *Crocker vs. Mann*, 3 Mo. 472; *Orth vs. Dorschlein*, 32 Mo. 366.

HENRY, Judge, delivered the opinion of the court.

The plaintiff sued defendant on a promissory note, executed by defendant on the 3d day of May, 1872, for \$520, payable to

Wells H. Blodgett on the 1st day of September, 1872, and alleged in the petition that it was assigned and delivered to him on the day of its date.

There was a verdict and judgment for the plaintiff from which defendant has appealed to this court.

The answer denies that the note was ever assigned and delivered to plaintiff, but alleges that plaintiff, by fraud, obtained possession of the same from said Wells H. Blodgett, with whom it had been left by defendant to be delivered to plaintiff when one James Robie should have executed a deed to defendant for his undivided half of a lot of ground in the town of Warrensburg.

The issue made as to the delivery of the note was found against defendant, and as no complaint is made of declarations of law on that subject, the finding of the court will not be disturbed, and we shall assume, in the consideration of the other questions arising in the case, that the note in question was, at the date of its execution, delivered to plaintiff.

The facts—about which there is no controversy—are, that defendant and one James Robie were partners in the drug business, at Warrensburg, Mo., and on the 26th day of October, 1871, entered into a written agreement for the dissolution of their co-partnership and settlement of its affairs, and also for the dissolution and settlement of another co-partnership for the manufacture of "Missouri Baking Powders," composed of Robie and defendant and one Simmons, who was also a party to said agreement; but inasmuch as the stipulations in regard to this latter co-partnership have no bearing upon this case, they will receive no further notice. In that agreement it was stipulated, between said Robie and defendant, that Robie should sell and Blodgett buy the interest of the former in the lot before mentioned, at a price to be fixed by disinterested parties to be selected by them. They owned said lot jointly.

On the 6th day of December, 1876, Robie and Blodgett entered into another written agreement which, reciting the dissolution of said firm, and the existence of a mortgage on the lot, executed by said Robie to Johnson county, on the 12th day of De-

cember, 1867, for \$601, and a subsequent deed of trust on the lot, executed by said Robie to plaintiff for \$545, and that under the written agreement of October 26th, 1871, the price of Robie's interest in the lot had been fixed at \$775, contains the following stipulation: "In consideration of the fact above mentioned, I, the said James Robie, do hereby agree to grant, bargain and sell to said E. A. Blodgett, all my right, title and interest in and to the said real estate aforesaid, for the consideration of \$775.00. And the said E. A. Blodgett, in consideration thereof, hereby agrees and binds himself to assume and pay off said notes of said Robie to the county of Johnson and George Cress," with interest, amounting in the aggregate to the sum of \$1,146.45, and for the excess of that indebtedness over the price of the lot, \$371.45, it was agreed that Blodgett should retain it out of Robie's interest in the notes and accounts owing to the firm, which he held for collection. Subsequently Cress and Blodgett met, and by an arrangement between them, an account owing by Cress, to Robie & Blodgett for drugs, was paid by deducting it from Robie's said indebtedness to Cress, and thereupon Blodgett executed the note in question for the balance, in compliance with the agreement made with Robie. After the execution of the note, the interest of Robie in the lot in question was advertised and sold under the mortgage to Johnson county, and purchased by Wells H. Blodgett, Robie's security on the note, who paid for it the amount of the note and interest. Plaintiff still holds the note against Robie, and has not entered satisfaction of his deed of trust.

Defendant, in his answer, relies upon the above facts to show that there was no consideration for the note, or that the consideration has failed, and contends that before plaintiff can recover against him on the note, he is bound to deliver to defendant a deed from Robie for the lot in question.

The undertakings of vendor and vendee are ordinarily dependent, and to entitle the vendor to recover the purchase money he must aver, in his petition, a performance or an offer to perform on his part, and sustain it by proof.

If a contrary intention, however, appear, that will prevail in determining the dependence or independence of the covenant. (Freeland vs. Mitchell, 8 Mo. 488 ; Cunningham vs. Morrell, 10 John. 202 ; Wadlington vs. Hill, 10 S. & M. [Miss.] 560 ; Wellman vs. Dismukes, 42 Mo. 101 ; Deitrich vs. Franz, 47 Mo. 85 ; Hunt vs. Livermore, 5 Pick. 395 ; Kane vs. Hord, 13 Pick. 281.)

Whether the doctrines which prevail on this subject, as between vendor and vendee, are applicable to the case at bar, we will not determine, but it might well be doubted, as it is now settled in this State and elsewhere, that a promise made to one for a valuable consideration, moving from him to another, who agrees to pay a sum of money to a third person, will support an action by the latter. (Rogers vs. Gosnell, 58 Mo. 589 ; Meyer vs. Louck, 44 Mo. 328 ; Rogers & Peak vs. Gosnell, 51 Mo. 466 ; Lawrence vs. Fox, 20 N. Y. 268.)

But assuming that those doctrines are equally applicable to one standing in the relation to the vendor or vendee occupied by the plaintiff, what was the intention of the parties in regard to the dependence of the obligation of the vendor to convey the lot and that of the vendee to pay the debts which were a lien upon the land ?

If the vendor had conveyed his interest to the vendee, the latter would have held the land subject to the debts he had promised to pay, and it was perfectly understood by both parties that the vendor could not make a good title, and the very incumbrances which hindered him from making such a title, the vendee agreed to pay off and discharge. As the conveyance by the vendor would not have invested the purchaser with a clear title, it was evidently the intention of the parties that the mortgage debts, which the purchaser had agreed to pay, and which exceeded, by several hundred dollars, the price of the lot, should first be satisfied ; for unless that were done the vendor could not make the vendee a title. Whose fault was it that the vendor could not make a title ? The lot was advertised and sold under the mortgage to Johnson county, given to secure one of the debts which the defendant agreed to pay, and he stood by and permitted it to



be sold to a purchaser for the amount of that debt. If he had complied with his contract with Robie and paid that debt, or purchased the property at the sale under the mortgage, in the former case, he would have had the control of the mortgage, and could have had no difficulty in procuring a complete title by taking an assignment of plaintiff's note and mortgage, because the two incumbrances which he had agreed to pay greatly exceeded the value of Robie's interest in the lot, and by purchasing at the mortgage sale he would have acquired a complete title. To permit the defense he now makes to avail him, would be to allow him to take advantage of his own wrong.

The appellant complains of the declaration of law, given by the court at the instance of plaintiff, that by the agreement between Robie and defendant, the obligation of defendant was to pay off the mortgage debts immediately. It does not appear from the evidence whether those debts were then due or not.

A fair interpretation of the agreement is, that defendant bound himself to pay those debts according to the terms of the notes and mortgages. If then due, defendant's obligation was to pay them immediately; if not due, then at their maturity. As the evidence on that point is not preserved, we cannot say whether the instruction was erroneous or not. We cannot presume that the instruction was wrong, but, on the contrary, must suppose that it is warranted by the evidence. Conceding that it was erroneous, however, it could not possibly have prejudiced defendant, because he fixed a time for the payment of plaintiff's debt by the note in suit, which was certainly due when this action was commenced.

The judgment is affirmed, the other judges concurring.

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JOHN W. EVANS, Respondent, *vs.* THE MISSOURI, IOWA AND NEBRASKA RAILWAY Co., Appellant.

1. *Charter of M., I. & N. R. R.—Railroads—Condemnation of land—Acquiescence in, by owner, what acts not equivalent to—Subsequent restraining order.*—The charter of the Mo., Iowa. & Nebr. R. R. (Sess. Acts 1851, §§ 7, 9, 10, 483; Sess. Acts 1857, § 10,) provided that on tender or deposit of the amount found by the commissioners due the land owner on condemnation of his land

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for railroad purposes, the company might go on and complete the road. A land owner having excepted to the report of the commissioners, under such proceeding, it was held that he having exhausted his statutory remedies his failure to ask for an injunction or the appointment of a receiver or other equitable intervention, while the road was being constructed over his land, was not tantamount to an acquiescence in its construction, but that after its construction, the road being insolvent, he was entitled, on proper steps taken, to payment of the amount awarded, or in default thereof to an order restraining the company from operating its road over his property.

*Appeal from Schuyler County Circuit Court.*

*F. B. Hughes & A. J. Baker*, for Appellant, cited: *Provolt vs. C., R. I. & P. R. R.*, 57 Mo. 256; *McAulay vs. W. & R. R.* 33 Vt. 311; *State vs. Rodman*, 43 Mo. 260; *Torrey vs. Camden & Atlantic R. R. Co.*, 3 C. E. Greene 293; *Greenlaugh vs. Manchester & Birmingham R'y Co.*, 3 Myl. etc. 785; *Hentz vs. Long Island & C. R. R.*, 13 Barb. 648; *Erie etc. vs. Delaware etc.*, 6 C. E. Greene, 283; *Goodwin vs. Cincinnati etc.*, 18 Ohio St. 168; *High Inj.* §§ 387, 397; *Commissioners of Highways vs. Dunham*, 43 Ills. 86; *Harness vs. Chesapeake & Ohio Canal Co.* 1 Md., 248; *Ross vs. Elizabethtown & Somerville R. R. Co.*, 1 Green. 422; *Browning vs. Camden & Woodbury R. R.* 3 Green. 4; and commented on *Richards vs. Des Moines Valley R. R.*, 18 Iowa 259; *Stewart vs. Raymond R. R.*, 5 S. & M. 568; *Bowers vs. Bears*, 12 Wis. 213.

*Higbee, McGoldrick, & Caywood*, for Respondent, cited: *Walther vs. Warner*, 25 Mo. 277; 1 Redf. Railw. 238, § 3 and notes 4, 5; *Id.* 238, § 6, and note 8; *High Inj.* §§ 392, 393 and note 1; §§ 396, 399-401; *Williams vs. N. Y. Cent. R. R.*, 16 N. Y. 111 (referred to in *Till. & Sherm. N. Y. Pr. Vol. 1*, 695.) *Henry vs. Dubuque & P. R. R.* 10 Iowa, 540; *Horton vs. Hoyt*, 11 Iowa, 496; *High Inj.* note 1, § 392; and commented on *Anderson vs. City of St. Louis*. 47 Mo. 479; *Provolt vs. C., R. I. & P. R. R.*, 57 Mo. 256.

SHERWOOD, C. J., delivered the opinion of the court.

On the hearing of this cause, the court below made an order whereby it was adjudged and decreed that defendant pay to plaintiff, on or before the 11th day of January, 1875, the amount

of damages adjudged to him at the April term, 1873, on account of certain condemnation proceedings, instituted by defendant, for a right of way over plaintiff's land. And it was also adjudged that defendant pay interest on the sum thus assessed, together with costs, as well of that proceeding as of the present, and that in the event that such payment was not made at the time designated, that a writ of injunction issue restraining defendant from operating its road and train of cars thereon, over plaintiff's premises, until such sum be paid, etc., etc.

This action of the lower court has caused this appeal by defendant. It is assumed by counsel that plaintiff must be presumed to have waived or postponed his right to insist upon immediate payment for his land. On what a slender foundation this assumption rests will be readily seen by reference to the defendant's charter and the agreed facts of this case.

That charter (Acts 1857, § 10, and Acts 1851, 483, §§ 7, 9, 10,) gave "full power to survey, mark, locate and construct a railroad," and "provides, in order that the progress of the work may not be impeded, that after said viewers have filed their report and plat in the office as aforesaid, the company, after having made a tender of the amount of damages to the person or persons, or made a deposit of the same with the clerk of the county court in which the case may be pending, shall be authorized to proceed in the construction of the work as fully as though no disagreement had arisen."

The parties failing to agree, commissioners were, in July, 1872, at the instance of the defendant, appointed, who assessed the plaintiff's damages at \$1.00, which sum, defendant, having already located its road, deposited with the clerk, and proceeded to construct its road. The plaintiff filed exceptions to the report of the viewers, and at the January term, 1873, the court set aside the report and appointed other commissioners, who, at the April term, 1873, assessed plaintiff's damages at \$48, and their report was confirmed and judgment rendered accordingly. Meanwhile, however, the defendant's road had been completed and in operation twenty miles west from plaintiff's land, prior to the setting aside of the report of the first commissioners,

and the defendant's insolvency is admitted, an execution having been issued and returned *nulla bona*. It is manifest that there was no *acquiescence*, by the plaintiff in the condemnation proceedings, unless that can be thus termed, which consists only in *active resistance*. What more than he has done could be required at his hands? For it seems he could not have enjoined the company from entering on his land for the purpose of doing that which the law gave express authority, viz: marking, surveying and locating its road. And the same remarks are equally applicable to the subsequent proceedings to condemn the right of way and the construction of the road. And this because the company was only exercising its *statutory powers*; powers explicitly granted, as the act in terms shows, in order to prevent the work from being impeded. (1 Redf. on Rly., § 97, 371; Walther vs. Warner, 25 Mo. 277.) And even if it were doubtful as to whether equity would interpose by injunction, notwithstanding the grant to the company of legislative authority, still this doubt should certainly not work the plaintiff an injury, nor should *laches* or acquiescence be imputed to him because he did not in addition to, and in conjunction with, his statutory methods of resistance, appeal also to chancery for aid, when it was at least doubtful whether any assistance from that quarter could, under the circumstances, be secured. It will not be directly claimed, though this is frequently done in an indirect and roundabout manner, that the rules of either law or native justice should change because a *corporation* happens to be plaintiff or defendant. If, in the present instance, the plaintiff had, of his own head, sold the strip of ground in controversy to an *individual* defendant, no one would doubt that unless waived by some affirmative or unambiguous act, the vendor's lien, still existing in all its original preference and priority, would be capable of enforcement, notwithstanding the insolvency of the purchaser. Would not this doctrine, *a fortiori*, apply where the property is seized *in invitum*—seized by a corporation in derogation of common law and common right? If the vendor's lien has its origin in the idea that it would be unconscionable to allow the vendee to retain property *voluntarily* sold to him, and not pay its price, would

not such retention be equally against good conscience, where the sale is *compulsory*, and the property transferred by mere operation of law? It would seem clear, beyond question, that the usual equity of a vendor in this regard would be so greatly strengthened by that imperious constitutional mandate, which prohibits property from being taken without just compensation, as to require, if anything, more cogent evidences of waiver than under ordinary circumstances; for surely a constitutional right should not be lightly inferred away, nor should courts be ingenious in drawing remote and strained inferences in support of an assumed waiver, where a corporation is to be benefited thereby; inferences which they would speedily scout, were natural persons, under similar circumstances, invoking remedial justice.

If the law favors uniformity, if, indeed, it is no respecter of persons, there can be no difference in point of abstract principle, nor yet in its application, whether applied to the adjustment of rights between a natural person and a corporation, or where a like adjustment is sought between individuals alone. These remarks are induced by the position of defendant's counsel, before referred to, and by the authorities cited in support of that position.

In the case of *Provolt vs. C., R. I. & P. R. R. Co.* (57 Mo. 256), a case which goes far beyond any other to be found in the books, it was held that ejectment could not be maintained against a railroad company, although failing to pay the owner for his land, and this upon the ground of his having *waived* his right to insist on immediate payment. But though the remedy by ejectment was denied, because of the supposed waiver, it was still held that the plaintiff was entitled to equitable relief, *ex. gr.* by having a receiver for the road appointed. That case is claimed as the counterpart of this, and so it would seem to be, and it is insisted that a waiver which should preclude a recovery in ejectment, should likewise preclude an injunction. And there would appear to be no little force in the observation, because either method of redress, if enforced, would effectually interfere with the interests of "*the public*," by preventing the operation of



the road, which appears to be regarded by defendant's counsel as a very strong point.

In Walker vs. C., R. I. & P. R. R. Co., (same volume), it was held that mere silence and inaction for the time being, on the part of the land owner, while a railroad was being built over his property, would not be construed into acquiescence nor estop him from his action of ejectment. And in Walther vs. Warner (25 Mo. 277), cited with approval in the Provolt case, it is said in conclusion, that "all the cases in all the books seem to assume that an individual cannot be *absolutely deprived* of his property without the *actual payment* of the assessed price, even though a proper provision is made in the act authorizing the taking of it; and perhaps it would be better to hold that, even in cases where proper provision is made for the payment of the price, so that the property is allowed to pass, it passes subject to the condition that the price is subsequently paid, so that if for any cause it be not paid, the party may re-possess himself of it on account of the condition broken."

It is altogether unnecessary to say whether the facts in the Provolt case were of a character to establish the inference of a waiver. It is sufficient to observe that, applying the rule before announced, the same rule which should govern between ordinary vendor and vendee, we have after careful consideration of the facts before us, been unable to discover anything on the part of plaintiff, even remotely indicative of an intention to surrender, or so much as postpone the right which the constitution so sedulously protects. For he met the railroad company at the very threshold of controversy, exhausted every means of statutory resistance, and I, for one, will never say that *this* amounts to either *laches* or *acquiescence*, or that his appeal to a court of equity for the enforcement of a plain, constitutional right shall be in vain.

The case of McAuley vs. Western Vt. R. R. Co., (33 Vt. 311) an action of ejectment cited in the Provolt case as "*strikingly in point*," originated in a *written contract* between McAuley and the railroad company, to take stock at its par value for his damages. And the company entered with the *consent* of the



owner, and completed its road in 1851. During the progress of the work, and when near completion, the parties disagreeing *merely* as to the *quantum* of damages, proceedings were instituted by the company, damages assessed, and their amount in stock deposited with the clerk, McAuley having repeatedly refused to receive it, and there it remained at the commencement of the action of ejectment, *six years* thereafter. But there was no attempt on his part to revoke the license, granted the company to enter on his land, although he discovered the alleged fraud (which consisted in the particular line of location of the road through his land) before the damages were assessed. Meanwhile, however, the decree of foreclosure obtained upon the first mortgage became absolute, and the title to the road and franchise passed to the trustees under the mortgage. And this appears to have occurred prior to the bringing of the ejectment suit. The only burden of McAuley's complaint, as is clearly shown by Judge Redfield's opinion, was *not* the taking of his land; on this score he had and made no objection until he brought his suit. On the contrary, "his great desire" (as the learned judge remarks) "seems to have been that the damages should be agreed upon, and that he should be released from all claim under the written agreement to accept *stock*. To this extent his remonstrances were sufficiently loud and intelligible." \* \* \* "And he was therefore willing that they should go forward in the construction of their road, if they would only *agree* to pay him the *money* for his land damages."

All these circumstances were taken into consideration, and the plaintiff was held not entitled to maintain his action. And the obvious justness of that decision, proceeding as it does on the grounds of license, in the first instance, under a written agreement, of silent acquiescence for six years after the discovery of fraud, and the acquisition of rights by innocent third parties upon the faith of that agreement, cannot be questioned. But the facts of that case bear not the faintest resemblance to this; and it is a total perversion of language to assert the remotest analogy between them. And the same may be said of *Goodin vs. Cincinnati and White Water Canal Company* (18 Ohio St., 169), for

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that was a bill in equity between a portion of the stockholders of the Canal Company and two railroad companies, in consequence of a fraudulent combination, whereby the *canal* was despoiled and a railroad track built thereon. There was *laches* in that case also, and the complaining stockholders of the Canal Co. might well be "*presumed*" to know and acquiesce in what their *own directors* were doing.

Greenhalgh vs. The M. & B. R. R. Co., (3 Mylne & Cr. 784) was a proceeding for *specific performance* of a written contract between the plaintiff who was an "*assenting party*" to a bill offered in parliament to establish the South Union R. R. Co., which, by act of parliament, was consolidated with a bill for the formation of the M. & B. R. R. Co. A temporary injunction in aid of the proceeding for specific performance was granted, which, on final hearing, was dissolved on the grounds above stated, in connection with the fact that the plaintiff had written to the company expressing his entire willingness to let it have such portion of his land, embraced in the written contract, as might be desired.

Toney vs. C. & A. R. R. Co. and R. & D. B. R. R. Co. (3 C. E. Green., 293) was merely a proceeding by the *contractors* who built a *branch road* for one company to compel defendants to pay for the work, and to restrain the R. & D. B. R. R. Co. from using the branch road till paid for. Injunction was refused because plaintiff's *remedies at law* were ample, and it was observed: "If the road was in their possession they could maintain trespass; and if not in their possession and not let to the company, possession could not be obtained by ejectment."

Erie R. R. Co. vs. Del., Lack. & Western and Morris & Essex R. R. Co's, (6 C. E. Green., 283) was a contest between rival railroad companies as to which was entitled to a right of way, the *title* to which was in *dispute*. Besides the complaining company had not only witnessed without objection the construction of the rival road, but had lent its "*active assistance*" by selling for a large sum of money a portion of his own land to aid in the construction of the road complained of, and it was held

that injunction could not be granted, and this very properly, owing to the equitable estoppel which had clearly arisen.

There is nothing, therefore, in the incidents of these cases at all parallel to the case at bar, or which give the slightest support to the position taken by defendant's counsel; and the like observation applies to *Commission of Highways vs. Dunham*, (43 Ill. 86); *Ross vs. E. & S. R. R. Co.*, (1 Green. Ch. 422); *Browning vs. C. & W. R. R. Co.*, (3 Green. Ch. 47); and in *Harness vs. Chesapeake & Ohio Canal Co.*, (1 Md. Ch. 248) also cited for defendant, where an injunction *was* granted, it was held that the act of the legislature only conferred a "*temporary privilege*" on the company to proceed with its work; a privilege which *ceased* when the damages assessed were not paid. And it was also said: "If the owner has the right to insist upon the payment of the money before his property is wrested from him, (and such right cannot be disputed) what is to prevent him from invoking the aid of the court for his protection, if the judgment for the money remains unpaid. The argument that the judgment is no more than a general lien, does not militate against this right of the owner of the land. His title does not rest upon his right, as a judgment creditor, but upon the act of assembly, and upon that settled and fundamental doctrine according to which the owner of property, taken for public use, is entitled to compensation, and as Chancellor Kent says, "to have it paid before or at least concurrently with the seizure and appropriation of it."

The further position is taken for defendant, that although the road is completed and in operation, the owner not paid, the company bankrupt, and all the injury done to plaintiff that can possibly be done, and after "*the public has acquired a right*," that this is a reason why equity should not interpose by granting restrictive relief.

This position is taken with a very poor grace by a corporation, which, under the arbitrary forms of law, has wrested property from its owner. But the complexion of this case is not at all altered by any or all of the aforementioned circumstances. That mythical personage, "*The Public*," so often summoned as a conven-

ient accessory when some flagrant wrong upon constitutional right is in contemplation, can only "acquire rights" in the land even of the humblest citizen *by payment therefor*. The plaintiff not being guilty of *laches*, not having waived or postponed his claim, *his* right to pay for his property as a *constitutional condition precedent* still exists in all its original vigor. And for the enforcement of this right equity will fully supply a remedy, and such a remedy as will fully meet the exigencies of the case. For as Judge Story so eloquently observes: "The beautiful character, pervading excellence, if one may so say, of equity jurisprudence, is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes." (1 Sto. Eq., Jur. § 439.) And Lord Chancellor Cottenham repeatedly laid down the rule that it was the duty of a court of equity to "adapt its practice and course of proceeding, as far as possible, to the existing state of society, and apply its jurisdiction to all those new cases, which, from the progress daily making in the affairs of men, must continually arise." (22 Redf. Railw., 310, § 9, and cas. cit.)

Now it is obvious that were the plaintiff's lien as vendor to be enforced, it could only result in a sale of that portion of the railway track passing through plaintiff's land; a something which would be of no use to a third party, and if bought in by plaintiff, himself, he would be in the same situation as at present, without compensation for the injury done that portion of his land covered by the railroad track, and without pay for the damage necessarily resulting to that portion not thus included. And it is equally obvious that it would be quite as unavailing to have a receiver appointed to administer the affairs of a *bankrupt* corporation. But even were this not so, a court of equity, owing to the flexibility of its powers, is not confined to a *single* method of affording redress, but will, as just seen, adopt that method of administering relief, as will, without circuity of action, compel the party in default to do equity.

The method best promotive of such end is that resorted to by the court below, and abundantly sustained by the following authorities:

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In *Stewart vs. Raymond R. R. Co.*, (7 Smede and Marsh, 568) where the road was already completed and in operation, but the company insolvent, an injunction was granted until the payment of damages, and if not paid in a reasonable time the injunction to be perpetual. In that case it is very pertinently said: "The company does not pretend that the purchase money has been paid; neither does it deny its liability to pay the damages awarded. It only insists that it is entitled to an indefinite credit and to the intermediate enjoyment of the easement, until the money to pay can be made. We know of no principle to sustain this assumption. \* \* \* If the company has no right to the easement before the payment of the damages, the proposition that Stewart has a right to restrain the passage of the cars until such compensation, would seem to follow as an inevitable consequence." To the same effect are 1 Redf. Railw. 241, § 6, and cas. cit.; *Richards vs. D. M. V. R. R. Co.*, 18 Iowa, 259; *Henry vs. D. & P. R. R. Co.*, 10 Id. 540; *Horton vs. Hoyt*, 11 Id. 496; High Inj., § 393; *Davis vs. L. C. & M. R. R. Co.*, 12 Wis. 16; *Cozens vs. Bangor R. R.*, 12 Jur., N. S. 738. And the doctrine asserted by most of the authorities, (*Nichols vs. Salem*, 14 Gray, 490; High Inj. § 394; *New Albany vs. Connelly*, 7 Ind. 32; *Parham vs. Justices, &c.*, 9 Geo. 341; *Keene vs. Bristol*, 26 Penn. St. 46), that where a statutory remedy is provided for obtaining damages for private property, taken in the construction of roads, equity will not extend its protection until such statutory remedy be first exhausted, does not affect the *status* of the plaintiff, as he has brought himself fully within the rule by exhausting all statutory measures of redress before appealing elsewhere for aid. The doctrine above mentioned, that it is wholly impossible for the land owner, prior to the exhaustion of the remedies the statute provides, "*to obstruct or in anywise impede the progress of the work,*" as well as the obvious corollary deducible from such a premise, would seem in the *Provolt* case to have entirely escaped observation.

The foregoing reasons seem conclusive that the judgment should be affirmed, and it is so ordered. All the judges concur.

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Rose v. Cobb, et al.—Lillis v. The St. Louis, Kansas City & Northern R'y Co.

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HENRY ROSE, Respondent, *vs.* S. H. COBB, *et al.*, Appellants.

1. *Justice of the peace—Constable, suit against for fees—Form of action.*—Under section 24 (Wagn. Stat. 845), a justice of the peace may proceed in his own name against a constable and his sureties, for fees collected by such constable, and not paid over as required by law; and under § 26 it is clearly open to such a claimant to proceed in that way, or institute a suit in a more formal manner upon the constable's bond; and if the latter course is taken the action must be in the name of the State.
2. *Appeal without merit—Damages.*—Where an appeal is without merit, judgment will be affirmed with ten per cent. damages.

*Appeal from Jackson County Circuit Court.*

J. E. McCay, for Respondent.

Wm. E. Sheffield, for Appellants.

SHERWOOD, C. J., delivered the opinion of the court.

There is no doubt but that a justice of the peace may, in his own name, under the provisions of section 24 (Wagn. Stat. 845), proceed against a constable and his sureties for fees collected by said constable and not paid as required by law.

This is clearly shown by that section, and a subsequent section (26) shows that it is open to a claimant, under the preceding section, to proceed in the manner above indicated, or to institute suit in a more formal manner on the official bond, and if on the bond the suit must be in the name of the State.

But here the suit is not on the bond, although that is referred to in the complaint as a means of designating the sureties and claiming a recovery against them as such.

There is no merit in this appeal, and the judgment is accordingly affirmed, with ten per cent. damages. All the judges concur.

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LAWRENCE LILLIS, Respondent, *vs.* THE ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY COMPANY, Appellant.

1. *Railroad—Commutation ticket—Ejection of holder—Rights and liabilities of company—Passenger and trespasser.*—Where the holder of a 1000 miles railroad commutation ticket, expressed to be "good for six months only," after that period had elapsed, having first obtained legal advice that the ticket was



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good till the thousand miles were traveled, and before the ticket was exhausted, took his seat in the baggage car of a train, refused payment of fare otherwise than by offering his ticket, and was forcibly ejected from the train. *Held*, that the ticket was void; that the holder was not a passenger but became a trespasser on entering the baggage car and upon his refusal to get off might be ejected, with the use of any force necessary to that end, and at a point contiguous neither to a station nor dwelling house; that the statute (Wagn. Stat. 307, § 28) had no application to such a case.

2. *Instructions—Evidence—Refusal of.*—Instructions not warranted by the evidence are properly refused.

*Appeal from Jackson County Circuit Court.*

*Wells H. Blodgett, for Appellant.*

I. There was absolutely no evidence showing that the relation of *passenger* and *carrier* existed between the plaintiff and defendant.

The testimony of the plaintiff himself shows that he was not a passenger. It shows that he intended to practice a deliberate fraud upon the defendant from the time he entered the baggage car at Kansas City. He knew his ticket had expired, and he says he did not intend to pay his fare.

The relation of *passenger* and *carrier* arises out of contract, either express or implied. There can be no valid or binding contract without a consideration to support it, and hence, before the plaintiff could claim to be a passenger, it devolved upon him to prove that he had paid some consideration for being carried; or he was bound to prove that he was ready and willing to pay upon demand. If the plaintiff had purchased and paid for a ticket from Kansas City to St. Louis, the contract would have been express. If he went upon the train intending to pay upon demand, a contract would have been implied; but not having paid, or intending to pay, no contract existed. (*Higgins vs. Hannibal & St. Joe R. R. Co.*, 36 Mo. 433; *Nichols vs. Union Pacific Rly. Co.*, 8 Kas. 519; *Robertson vs. New York & Erie Rly. Co.*, 22 Barb. 91; *Moss vs. Johnson*, 22 Ill. 640.)

II. The court erred in refusing defendant's sixth instruction. If the plaintiff went into the baggage car not intending to pay his fare, and knowing that his ticket had expired, he was a wrong-

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doer, and if he was ejected, without unnecessary force, he cannot complain. The situation was one of his own choosing, and if he suffered any inconvenience from the fact that he was not put off at a regular stopping place, or near a dwelling house, it was a result that flowed directly from his own conduct. A party cannot purposely place himself in the wrong, and then invoke the law to protect him from the direct consequences of his own act. The instruction only assumes that if the plaintiff was wrongfully upon the train, the defendant had the right to eject him at any place, without unnecessary force.

The instruction should have been given; for if it is not correct a person may, by his own wrongful act, impose a legal obligation upon his victim to protect him (the wrongdoer) from the consequences of his own misconduct. (*Terre Haute & Indianapolis R. R. Co. vs. Fitzgerald*, 47 Ind. 79.)

III. The first instruction given for the plaintiff was wrong in authorizing the jury to award exemplary damages. There was no evidence of malice on the part of the conductor or his assistants. There was absolutely no evidence of a design on the part of the conductor, or other employees of the defendant, to do plaintiff any great personal injury, nor does the evidence show that the plaintiff had reasonable cause to apprehend immediate danger of such design being accomplished.

*Tichenor & Warner*, for Respondent.

I. Plaintiff entered the baggage car and sat down, no one objecting. No evidence of any rule of defendant against it. He became a passenger. (*Edgerton vs. N. Y. & H. R. R.*, 39 N. Y. 227; *Illinois Cent. R. R. Co. vs. Sutton*, 53 Ill., 397; *Dunn vs. Grand Trunk R. R. Co.*, 58 Me. 187; *Mobile & O. R. R. Co. vs. McArthur*, 43 Miss. 180; *O'Donnell vs. Allegheny Valley R. R.*, 59 Penn. 239.)

II. But the fact of his being in this car has no bearing on the case, as the injuries complained of did not happen because he was in this car.

III. As the refusal of a passenger to pay fare will not justify homicide, so it fails to justify any act which, in itself, puts human

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life in peril, and the passenger has the same right to repel an attempt to eject him, when such an attempt will endanger him, that he has to resist a direct attempt to take his life. (*Sanford vs. The Eighth Ave. R. R. Co.*, 23 N. Y. 343; *Wagn. Stat.* 446, § 4.)

IV. The instructions on each side stated correctly the law in reference to the use of unnecessary force. (*Perkins vs. M., K. & T. R. R. Co.*, 55 Mo. 202; *Wagn. Stat.* 307, § 28.)

V. The jury were instructed, that in order to assess any sum as exemplary damages, they were obliged to find that plaintiff was injured maliciously. Evidence showed that the conductor was still in the employ of defendant at time of trial. (*Perkins vs. M., K. & T. R. R. Co. supra.*) This stated the law more strongly in defendant's favor than the law allowed. (*Malleck vs. Tower Grove & L. R. R.*, 57 Mo. 17; *Parker vs. Shackelford*, 61 Mo. 68.)

HENRY, Judge, delivered the opinion of the court.

On the 18th day of June, 1873, the plaintiff purchased of the defendant a thousand mile ticket, to be used within six months from that date on defendant's railroad. The following is a correct representation of the face of the ticket :

1	1	1	1	1	1	1	0	2	2	2	2	2	2	2	2	2	2	3	3	0	0	
0	1	1	1	1	1	1	2	2	2	2	2	2	2	2	2	2	2	3	3	3	3	
0	0	0	<p>This Ticket is good for 1000 miles traveled on the St. Louis, Kansas City &amp; Northern Railway and branches, only when properly stamped and presented, within six months from date, by</p> <p><b>LAWRENCE LILLIS,</b></p> <p>under the conditions printed on back.</p> <p>* * lbs. baggage paid.</p> <p><b>F. CHANDLER,</b> Gen'l Pas'ger. &amp; F't. Agt.</p> <p>No. 1324.</p>																	3	3	3
0	0	0																		3	3	3
0	0	0																		4	4	0
0	0	0																		4	4	4
0	0	20																		4	4	4
0	0	20																		4	4	4
0	15	0																		4	4	0
0	0	15																		4	4	0
0	10	0																		5	4	0
0	0	10	0	10	6	6	6	6	6	6	6	6	6	6	5	5	5	5	5	5	5	
0	0	0	0	0	0	0	6	6	0	0	0	6	6	5	5	5	5	5	5	5	0	

On the back of said ticket were the following conditions :

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1. "This ticket is good only for passage of the person named thereon, and if presented by any other person, the conductor will take it up and collect full fare.

2. "For each trip, the conductor will punch out figures indicating the number of miles traveled with him on that trip. The holder must in all cases take a train which stops regularly at the station to which he is going.

3. "No portion of the money received for this ticket will be refunded on account of failure to use it within the specified time, nor will its limits be extended. It will not be good for passage unless presented within the limit named below.

4. "This ticket is good for freight trains, only on the express conditions that the passenger named on it, while on such trains, assumes all risks of accidents and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger using the ticket, and agrees that he, or she, will not consider the company as common carriers, or liable to him, or her, as such.

5. "This ticket is good only until December 18th, 1873."

On the 9th day of February, 1874, the plaintiff, at Kansas City, entered the baggage car attached to one of defendant's passenger trains, bound for St. Louis, and when the conductor of the train, S. H. Miller, applied to him for his fare, or ticket to his place of destination, he tendered this 1000 mile ticket. The conductor told him he could not pass him on that ticket. Plaintiff said he would not pay his fare. Conductor then told him he would put him off. Plaintiff said "that is all right." The conductor pulled the bell cord and asked plaintiff to get off, and he again said he would not. The conductor then took hold of him to put him off, and plaintiff resisted. This is the plaintiff's own statement. The conductor not being able to eject plaintiff from the car, called to his assistance the baggage master, who also took hold of plaintiff, and told him he had better get off and have no trouble, and remarking to plaintiff that he and the conductor could not put plaintiff off, they left him and went back into the passenger car, but in a short time returned with several other em-

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ployees of the company, who finally succeeded in putting plaintiff and his baggage off, at a place about one mile from Harlem station, and four miles from the next station east, and almost six hundred yards from a house north of the road, but whether a dwelling house or not the evidence leaves in doubt. This occurred a little before sunset and plaintiff walked back to Kansas City, arriving there before dark. Plaintiff received a cut on the head and on the little finger, and he testified that at one time during the melee, he had hold of the conductor's coat and the latter struck him a blow on the forehead, and that some one called out to the conductor, don't strike him in the face. Plaintiff offered all the resistance in his power, and is a man of considerable physical strength. We infer from the evidence that he was, physically, a powerful man.

Plaintiff is contradicted by the conductor in regard to the latter striking him, nor is he corroborated in his testimony, on that point, by any other witness. It seems, from his testimony, that he had consulted a lawyer, who gave it as his opinion, that although six months from the date of the one thousand mile ticket had expired, he had a right to ride on the defendant's road, until he had traveled the one thousand miles. He had traveled four hundred and fifty miles on that ticket, and if valid, there were enough miles remaining to carry him to St. Louis. The injuries received by plaintiff did not disable him, or interfere with his business, except to detain him at Kansas City until the next train went east, not exceeding twenty-four hours. Plaintiff sued the defendant to recover damages, and on a trial in the circuit court of Jackson county had a verdict for \$3,000, but at the suggestion of the court entered a *remittitur* of \$1,000, and judgment was then rendered in his favor for \$2,000, from which defendant has appealed to this court.

The court for plaintiff gave the following instructions :

1. "If you believe from the evidence, that the conductor and other servants of defendant, acting under orders of the conductor, forcibly put plaintiff off from the train, and in doing so used unnecessary force, and unnecessarily beat, cut or bruised plaintiff while he was on the train, then the jury will find for the plain-



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tiff, and assess his damages at such sum as you may believe from the evidence to be a just compensation for the injuries sustained; and if you further find that said plaintiff was so injured maliciously, you may also assess such further sum as exemplary or punitive damages as will be a warning to defendant and its agents, although you may believe that plaintiff offered the conductor a thousand mile ticket, which, according to the printed condition thereon, had expired, and refused otherwise to pay his fare.

2. "If you believe from the evidence, that the conductor and other servants of defendant forcibly put plaintiff, together with his baggage, off from the train of defendant, and did so put him off, not at any usual stopping place, or near any dwelling house, then you must find for plaintiff and assess his damages at such sum as you shall believe, from all the facts and circumstances, to be a just compensation for the injuries sustained by him, if any, but to an amount not exceeding five thousand dollars.

3. "If you believe from all the facts and circumstances given in evidence, that plaintiff, on the 9th day of February, 1874, was on the train of defendant with the intention of going to St. Louis as a passenger thereon, and that while on such train he refused to pay his fare, and had no other than the ticket read in evidence, and that the conductor and other servants of the defendant, under the orders and directions of said conductor, removing or ejecting plaintiff, used unnecessary force, and that plaintiff had reasonable cause to apprehend a design on the part of said conductor or other employees of defendant at such time, to do him some great personal injury, and that there was reasonable cause to apprehend immediate danger of such design being accomplished, then, in either of such cases, the plaintiff had a right to resist and repel force with force."

Instructions for defendant, given by the court :

1. "It is admitted by the pleadings in this case, that the plaintiff, on the — day of February, 1874, entered upon a train of defendant's cars at Kansas City, for the purpose of being conveyed from Kansas City to the City of St. Louis, and it is admitted that plaintiff presented to the conductor of said train a ticket, dated on the 18th day of June, 1873, which said ticket was by



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its terms good for one thousand miles of travel on the defendant's railroad, only when the same was presented within six months after the date thereof; (and the jury is instructed that the ticket, as presented by plaintiff, was at said time worthless and void, and that the conductor of said train was not bound to receive the same, nor was the plaintiff, on the — day of February, 1874, entitled to travel upon said ticket in the defendant's cars from Kansas City to any other point upon said road,) and if the jury further find from the evidence that the conductor of said train stopped the same near a dwelling house, and requested the plaintiff either to get out of said car or pay his fare, and that plaintiff refused either to get out of said car as requested, or pay his fare as requested, and that the conductor then called to his assistance the brakeman and other employees of defendant on said train, and that two or more of them thereupon took hold of plaintiff and ejected or expelled him from said car, and put him and his baggage out upon the ground without using any more force than was necessary in order to overcome his resistance and remove him from said car, then the plaintiff cannot recover in this action for any injury he may have received or sustained, by being so ejected or expelled from said car."

2. "Although the jury may find from the evidence that plaintiff did receive some personal injury in being ejected or expelled from the defendant's car; yet, if the jury further find from the evidence that the plaintiff, after being informed by the conductor that the ticket used in evidence was worthless and void, refused upon the request of the conductor, either to pay his fare or go out of said car, and quit said train, and that said train was then stopped near a dwelling house, and that when the conductor and other employees of defendant afterwards attempted to remove him, he resisted them, and that his said injuries were caused solely in consequence of the force necessarily used in overcoming his resistance, then he cannot recover in this action on account of any personal injury so received."

3. "The jury are instructed that the term "near a dwelling house," as used in the foregoing instructions, does not mean that such dwelling house should be immediately adjoining the track

of the railroad at the place where the train was stopped ; but it means a dwelling house so conveniently near, as to enable plaintiff to reach the same without exposing his person to unusual hardship or danger, or his baggage to loss or damage."

4. "Although the jury may believe from the evidence, that plaintiff was not ejected from the defendant's car near a dwelling house, as that term is defined in the foregoing instructions ; yet, if the jury further find that plaintiff refused to pay his fare or quit said train, after he was informed by the conductor that the ticket read in evidence was worthless and void, and that the conductor and brakeman thereupon ejected him from said train without unnecessary force, then the plaintiff can only recover in this action such damage as he sustained by reason of there being no dwelling house near the point where he was put off said car."

5. "If the jury find from the evidence in this case that plaintiff was ejected from the train in question near a dwelling house ; then under the pleading in this case he cannot recover for any personal injury he may have sustained, unless he has shown, to the satisfaction of the jury, that unnecessary force was used in ejecting him from said car."

Instruction refused: 6. "If the jury find, from the evidence, that the plaintiff knew the terms and conditions of the ticket read in evidence, and that with such knowledge he did on the 9th day of February, 1874, enter and remain in a baggage car attached to a passenger train on the defendant's road, with a design of being conveyed upon said ticket from Kansas City to St. Louis, without paying or intending to pay to the defendant any fare, and that he refused to pay his fare after the same was demanded of him by the conductor, then the jury is instructed that the plaintiff did not become a passenger upon said train, and the conductor thereof had a right to stop said train at any place, and use sufficient force to expel or eject the plaintiff and his baggage from said car without rendering the defendant liable in this action."

The court refused to give the said instruction No. 6, and defendant excepted.

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The instruction asked by defendant and refused by the court presents the question, whether on the facts in this case plaintiff was a passenger on defendant's train, and as such entitled to the rights and immunities secured to passengers by the law.

It is evident that plaintiff entered the train determined not to pay any fare, but to travel upon his one thousand mile ticket, or be ejected from the train. He at no time offered to pay any fare, declared repeatedly that he would not, and had previously taken the opinion of a lawyer, who had advised him that he had a right to ride on defendant's road until he had traveled the entire number of miles specified, without regard to time.

He knew the conditions printed on the back of the ticket; and on its face was an express printed stipulation that the ticket was good, "when properly stamped and presented within six months from date by Lawrence Lillis, under the conditions printed on the back."

He testifies that he knew what the conditions were. When the conductor refused to carry him on that ticket, he did not leave the train when ordered to do so—which he might have done and instituted a suit if he desired to test the correctness of his lawyer's opinion, that he had a right to ride on that pass—but by physical resistance, compelled the conductor to call to his assistance three or four other employees to eject him from the car. That he went into that car with the deliberate purpose of laying the foundation for a law suit, with no intention of becoming a passenger unless he could by muscular power compel the conductor to carry him, is from the evidence in the case beyond all controversy, and he was as much a trespasser as if he had gone into that express car to rob it of its contents. Under these circumstances, is he to be regarded as a passenger? We think not, and to hold otherwise would be to disregard well established principles, which in cases between individuals no court would hesitate to recognize.

Merchants, shop keepers and hotel keepers, by the very nature of their respective occupation, give a general invitation to all persons to enter their houses of business, but if one enter one of these business houses for the purpose of pilfering or committing

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some other depredation, and is ejected, he cannot have an action for the trespass, and the general license given to enter would avail him nothing in a suit against the proprietor. He might recover if more force were used than was necessary to put him out, but the general implied invitation would not be allowed to be considered by a jury in determining the amount of his damages.

In the Union Pac. R. R. Co. vs. Nichols, (8 Kas. 505) the facts were that plaintiff was introduced to the conductor of the train by the express messenger, as an express messenger learning the route; that the conductor supposing him to be as represented, allowed him to ride in the baggage car without paying any fare. The baggage car was turned over, injuring the plaintiff seriously—for which he sued the company and recovered a judgment for \$22,500. The Supreme Court held that “the plaintiff was not a *passenger*, within the true legal signification of the term, he did not get into or ride in any *passenger car*, and he did not pay or agree to pay any *hire or reward* for his passage.”

Here plaintiff did not pay *any fare* but positively refused to do so—expressly refused to make a contract by which the relation of passenger and carrier would be established between him and the company.

The case of Robertson vs. N. Y. & E. R. R. Co., (22 Barb. 92,) was one in which plaintiff, with knowledge that the engineer had no authority from defendant to permit him to ride upon the engine, by the permission of the engineer did ride upon it and was injured by reason of the negligence, or want of skill, of defendant's employees while so riding.

The Supreme Court of New York held that “he was a wrong doer the moment he stepped his foot upon the engine, and so continued until he was injured, and could not recover.”

If a wrong doer, it must have been because he had no right to ride on the engine. In the case at bar, plaintiff had no right to ride on that train on his one thousand mile ticket, and he knew it because the stipulation on the face, and the indorsements on the back, of the ticket, were clear and explicit to that effect.) He went into that car not intending to acquire a *right* to ride on that train, but to compel the conductor to pass him on a void

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ticket, or to make a case for a suit for damages. His entry into the car was made with an evil intent, and he is entitled to no favor, but only to the rights which the law gives a trespasser.

The cases cited by appellee's counsel as authorities for the position that plaintiff is to be regarded as a passenger, do not support it. In 53 Ills. plaintiff entered the caboose car of a freight train which, by a rule of the company, was forbidden to carry passengers, but sometimes did carry passengers, and there were passengers then on the train with tickets procured from the company.

Plaintiff tendered his fare to the conductor who refused to receive it, and put plaintiff off of the train.

The court held that he was a passenger. The difference between that and the case at bar is so palpable that it needs no comment, and an equally striking difference will be observed between this and the case in 53 Ill., 58 Me., 43 Miss., and 59 Penn. If plaintiff had no right to ride on defendant's train, on that ticket, the conductor had a right to put him off; and not being a passenger, it makes no difference, whether at the station, or near a dwelling house or not, because § 28 (Wagn. Stat. 307,) has in that case no application. He had no right to use any more force than was necessary to eject plaintiff, but had a right to use as much force as was necessary for that purpose.

The first instruction given by the court for plaintiff, in telling the jury that if plaintiff was injured maliciously they might give exemplary or punitive damages, was not warranted by the evidence.

If there is any portion of the evidence tending to prove malice on the part of the employees it has escaped our attention; nor have we overlooked the fact that plaintiff testified that the conductor struck him a blow on the head with his fist, when he was literally tearing the conductor's clothes from his body. The third instruction was erroneous in telling the jury that, if plaintiff had reasonable cause to apprehend a design on the part of the employees of defendant to do him some great personal injury, and that there was reasonable cause to apprehend immediate danger, etc., then he had a right to resist and repel force with force.



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The evidence discloses no reasonable cause which plaintiff had to apprehend anything of the kind. He at any moment after the trouble commenced could have terminated it by leaving the train. If the conductor had the right to put him off, it was his duty to go off without being forced to do so.

If defendant had a right to put him off, he at the same time could not have a legal right to resist. He could not resist the conductor in the discharge of a duty and the exercise of a right, and by that resistance acquire a right to resist any necessary force to overcome it. There was no danger to be apprehended by plaintiff except what his resistance occasioned. We can find nothing in the evidence tending to prove that the employees of defendant had any intention of doing more than was necessary to eject plaintiff from the train. It is surprising, however, that even under those instructions the jury should have rendered a verdict against defendant for \$3,000.

Judgment reversed and cause remanded. The other judges concur.

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H. A. SAMSTAG, *et al.*, Respondents, *vs.* H. CONLEY AND N. H. DALE, Appellants.

1. *Bills and notes—Negotiability—Indorsement—Assignor, liability.*—An instrument in the following form is not a negotiable instrument.

"\$100. Neosho, Mo., Aug. 29, 1874, \_\_\_\_\_ after date \_\_\_\_\_ promise to pay to the order of \_\_\_\_\_ dollars for value received, negotiable and payable, without defalcation or discount, with ten per cent. interest thereon from maturity, till paid; and if said interest shall remain unpaid for the time of one year from the maturity of this note, then the same to become as principal, and to bear the same rate of interest as principal, and to be compounded annually; and we do each and severally waive, any and all exemptions under and by virtue of any execution, exemption, homestead or stay laws of the State of Missouri, or that of any other State; and we do each further promise and agree to pay a reasonable attorney's fee for the bringing suit in collection of this note, if suit thereon be brought or collection thereof be enforced after the same shall become due, payable at the Newton County Bank of Samstag & Stein." (See *First Natl. Bank of Trenton vs. Gay*, 63 Mo. 33.)



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And the indorsement by the payee simply makes him liable as assignor to pay after the exercise of due diligence by the holder, and failure to collect from the maker after suit, or in case of the insolvency or non-residence of the maker, so that a suit would have been unavailing.

*Appeal from Newton County Circuit Court.*

*N. H. Dale*, for Appellants.

*George Hubbert*, for Respondents.

HOUGH, Judge, delivered the opinion of the court.

The petition in this case contained two counts, and seeks to charge the defendant, Conley, as maker, and the defendant, Dale, as indorser, of two obligations in writing, alleged to be negotiable promissory notes. The instrument declared on in the first count is as follows:

\$100.

NEOSHO, Mo., August 29th, 1874.

One month after date I promise to pay to the order of N. H. Dale, one hundred dollars for value received, negotiable and payable without defalcation or discount, with ten per cent. interest thereon from maturity till paid; and if said interest shall remain unpaid for the time of one year from the maturity of this note, then the same to become as principal and bear the same rate of interest as principal and to be compounded annually; and we do each and severally expressly waive any and all exceptions under and by virtue of any execution, exemption, homestead or stay laws of the State of Missouri, or that of any other State; and do each further promise and agree to pay a reasonable attorney's fee for the bringing of suit in collection of this note, if suit thereon be brought, or collection thereof enforced after the same shall become due, payable at the Newton County Bank of Samstag & Stein.

Signed, H. CONLEY.

Indorsed, N. H. DALE.

The instrument declared on in the second count is in all respects identical with the foregoing, except as to amount, and is indorsed, N. H. Dale, L. B. Hutchinson.

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Miller, et al. v. Early.

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Plaintiffs recovered judgment against both defendants on both counts, and the defendant Dale has appealed to this court.

The question presented is, whether defendants Conley and Dale can be jointly sued.

As the obligations sued on cannot be held to be negotiable instruments, since the decision of this court in the case of the First National Bank of Trenton vs. Gay, (63 Mo. 33) the defendant Dale can only be held liable in an action against him on his implied undertaking, as assignor, to pay after due diligence used by the assignee in the institution and prosecution of a suit against the maker, for the recovery of the money due, or in the event of the insolvency or non-residence of the maker, so that a suit would be unavailing, or could not be instituted. (W. S., 270, vol. 1, § 8; Stone vs. Corbett, 20 Mo. 358.)

This suit having been brought against Dale as indorser of a negotiable promissory note and not on his implied undertaking as assignor, no recovery can be had against him in the present action, and the judgment will be reversed and the cause remanded.

All the judges concur, except Sherwood, C. J., absent.

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ANN E. MILLER, *et al.*, Plaintiffs in Error, vs. JOHN EARLY, Defendant in Error.

1. Miller vs. Bledsoe, 61 Mo. 96, affirmed.

*Appeal from Franklin County Circuit Court.*

This is an action of ejectment, brought by some twenty plaintiffs who are either heirs or grantees of heirs of Richard Caulk, deceased, to recover forty acres of land in Franklin county. On the trial, the plaintiffs showed title to the premises in themselves. The defendant having pleaded the statute of limitations as a bar to the action, showed possession for more than the period of limitations.

It appeared from the evidence that some of the plaintiffs were barred by the statute, and the others were not. The court gave an instruction, in substance, that upon this state of facts none of the plaintiffs could recover.

The verdict was for the defendant. Plaintiffs filed their motion for a new trial, which was overruled; and they then tendered their bill of exceptions, which was signed, and brought the case here by writ of error.

*A. McElhinney*, for Plaintiffs in Error, cited: *Miller vs. Bledsoe*, 61 Mo. 96; *Same vs. McClure*, *Ib.* 248; *Same vs. English*, *Ib.* 444.

*James Halligan*, for Defendant in Error.

In *Miller vs. Bledsoe*, 61 Mo. 96, the learned judge, who delivered the opinion of the court, seems to have overlooked the fact that *Walker vs. Baker* (32 Mo. 145) was commenced in 1851, and hence was governed by the act of 1849.

The case should have been dismissed as to those barred, and proceeded with as to those who were not. (*Pruill vs. Walker*, 38 Mo. 94.)

HENRY, Judge, delivered the opinion of the court.

The identical questions presented by the record herein were determined in this court in the case of *Miller vs. Bledsoe*. (61 Mo. 96.)

The only difference in the facts of the two cases, is, that in *Miller vs. Bledsoe*, Alton Long made a deed of bargain and sale, with the usual warranty, to one Hendricks, for the land in controversy in that suit, and in this, Alton Long and wife, and afterwards their heirs, conveyed the forty acres in dispute, in the case at bar, to one Boatright, who conveyed to Whitsett, who conveyed to defendant.

Both tracts were included in the patent from the United States to Richard Caulk's heirs.

With the concurrence of the other judges, the judgment is reversed and the cause remanded.

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**MARY S. HARLAN, Respondent, vs. ST. LOUIS, KANSAS CITY & NORTHERN RAILROAD COMPANY, Appellant.**

1. *Railroads—Damages—Contributory negligence.*—A stranger, in stepping out from behind a train of cars standing upon a side track of a railroad, to cross another track seven feet removed, was run over by a "pony" engine and killed. The engineer failed to ring the bell, but the locomotive could have been heard, while moving, at a distance of from one to two hundred yards. The engineer did not see the deceased, but, had he done so, could not have stopped the engine soon enough to prevent the accident; whereas the other might have both seen and heard the engine in time. *Held*, that although the failure to ring the bell was negligence in law, yet since the casualty was directly caused by the negligence of the deceased, and, after he stepped from behind the train, could not have been prevented by the engineer, the company was not liable.

*Appeal from Randolph County Circuit Court.*

*Wells H. Blodgett*, for Appellant, cited: *Harty vs. Central R. R. Co.*, 42 N. Y. 468; *O'Donnell vs. Prov. R. R. Co.*, 6 R. I. 211; *Shearm. & Redf. Negl.*, § 485; *Whart. Negl.* § 384; *Artz vs. Chicago, R. I. & P. R. R.*, 34 Iowa, 160; *Havens vs. Erie Railway*, 41 N. Y. 296; *Ernst vs. Hudson River Railroad Co.*, 39 N. Y. 61; 35 Id. 9; *Wilcox vs. Rome, W. & O. Railroad Co.*, 39 N. Y. 358; *Baxter vs. Troy & Boston R. R. Co.* 41 N. Y. 502; *Nicholson vs. Erie Rly Co.*, 41 N. Y. 525; *Grippen vs. New York Central Railroad Co.*, 40 N. Y. 34; *Gonzales vs. New York & Harlem Railroad Co.*, 38 N. Y. 440; *Wilds vs. Hudson River Railroad Co.*, 29 N. Y. 315; 24 Id. 430; *Gorton vs. Erie R. R.*, 45 N. Y. 660; *Morris & Essex Railroad Co. vs. Henton*, 4 Vroom, [N. J.] 189; *Runyan vs. Central Railroad Co.*, 1 Dutch [N. J.] 558; *Chicago & Alton Railroad Co. vs. Fears*, 53 Ill. 115; *Lafayette & Ind. Railroad Co. vs. Huffman*, 28 Ind. 287; *Pittsburg & Fort Wayne Railroad Co. vs. Vining*, 27 Ind. 513; *Toledo & Wabash Railroad Co. vs. Goddard*, 25 Ind. 185; *Steves vs. Oswego & Syracuse Railroad Co.*, 18 N. Y. 422; *Sheffield vs. Rochester & S. Railroad Co.*, 21 Barb. 399; *Brooks vs. Buffalo & N. F. Railroad Co.*, 25 Barb. 600; *Chicago, R. I. & P. R. R. vs. Still*, 19 Ill. 499; *C. C. & C. Railroad Co. vs. Terry*, 8 Ohio St. 570; *Evansville & C. R. R. Co. vs. Hiatt*, 17 Ind. 102; Ill. Central

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Railroad Co. vs. Buckner, 28 Ill. 303 ; North Penn. Railroad Co. vs. Heilmann, 49 Penn. St. 60 ; Harlem Railroad Co. vs. Coyle, 5 P. F. Smith, 396 ; Chicago & Alton Railroad Co. vs. Gretzner, 46 Ill. 74 ; Shearm. & Redf. Negl., § 488 ; Pierce Am. Rail. Law, 273 ; Butterfield vs. W. R. R. Co., 10 Allen, [Mass.] 532 ; Galena Union R. R. vs. Loomis, 13 Ill. 548 ; Stublely vs. London & N. W. R. Co., [L. R.] 1. Ex. 13 ; Finlayson, Adm'x, vs. C. B. & Q. R. R. Co., 1 Dill. 583 ; Evans vs. A. & P. R. R. Co. 62 Mo. 57 ; People vs. N. Y. Cent. R. R., 15 Barb. 199.

*G. F. Rothwell, with Waters & Winslow, for Respondent.*

I. A person may be improperly or unlawfully on the track of a railroad ; still that fact will not discharge the company or its employees from the observance of due care, and they have no right to run over and kill him, if they could have avoided it by the exercise of ordinary caution or watchfulness. (*Isabel vs. Han. & St. Jo. R. R. Co.*, 60 Mo. 481 ; *Kennedy vs. N. Mo. R. R. Co.*, 36 Mo. 363 ; *Meyers vs. C., R. I. & P. R. R.*, 59 Mo. 223 ; *Boland vs. Mo. R. R. Co.*, 36 Mo. 153 ; *Meyers vs. Pac. R. R. Co.*, 46 Mo. 153 ; *Huelsenkamp vs. Citizens' R. R. Co.*, 37 Mo. 537 ; *Morrissey vs. Wiggins' Ferry Co.*, 43 Mo. 383 ; *Whalen vs. K. C. & N. R. R. Co.*, 60 Mo., 32.)

II. The failure of defendant's employees to observe the provisions of the statute as to bell ringing is negligence *per se*. (*Wagn. Stat.* 310, § 26 ; *Karle vs. K. C., St. Joe. & C. B. R. R. Co.*, 55 Mo. 483 ; *Conell vs. B. C. R. & M. R. R. Co.*, 38 Iowa, 120 ; *Kennayde vs. Pac. R. R. Co.*, 45 Mo. 261 ; *Tabor vs. Mo. Valley R. R. C.*, 46 Mo. 356.)

NAPTON, Judge, delivered the opinion of the court.

The petition in this case was under the second section of the damage act, for the negligent killing of the plaintiff's husband by a locomotive of the defendant.

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The answer of the defendant, after denying the allegations of the petition, set up as a defense that the plaintiff's own negligence was the cause of the disaster.

The evidence in the case, in which there was no conflict, established the following state of facts: The deceased, who lived in the town of Moberly, was passing from the east side of the railroad, on a frequented path leading over the tracks, in the middle of a clear day in November, and was killed by what is called the "pony" engine, running backwards on the main track. He stepped from behind some cars standing on the side track, which was seven feet from the main track, and was killed by this engine almost immediately. He wore a fur cap with ears to it, but it seems from the testimony that his hearing and eyesight were ordinarily good. The bell on the "pony" engine, having no rope to it, was not sounded by the engineer, and there was a freight train on the adjoining track, about fifty feet off, on which there was a bell ringing which could be heard all over the town. The locomotive that killed Harlan could be heard, when in motion, without a bell, at a distance varying from one hundred to two hundred yards. The engineer of this locomotive did not see Harlan till he was run over, the engine going backwards. The track was a straight one, and the engine could have been seen at a considerable distance. There was no possibility of stopping it, had the engineer seen Harlan before he was struck, so as to avoid the disaster that occurred.

The instructions given by the court to the jury were undoubtedly the law, and distinctly declared that the plaintiff could not recover if the disaster was produced by Harlan's own negligence, although the bell was not sounded, provided the engineer could not have prevented the accident. The jury, however, found a verdict for the plaintiff.

7 The principles of law applicable to this case are so well established that we deem any citations of authority unnecessary. They are cited at length in brief of appellant's counsel. A person who goes on a railroad track, or proposes to cross it, must use his eyes and ears to avoid injury. A neglect of regulations in regard to bell ringing may amount to negligence in law, on



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the part of the railroad employees, but that does not absolve strangers, who propose to cross the track, from ordinary care. Indeed every intelligent person, who has arrived at years of discretion, is presumed to know that it is dangerous to be on a railroad track when trains are passing to and fro, and when crossing one he is expected to be vigilant and watchful of the approach of a locomotive. The failure to exercise such vigilance is negligence *per se*. ✓

Conceding, in this case, that the failure to ring the bell was negligence on the part of the defendant's servants, yet Harlan could both see and hear the locomotive, if he had looked or listened, and his stepping on the track, on the approach of the engine at a slow rate of speed, appears unaccountable. He seems to have been either absorbed in thought, or concluded, after he saw the engine, that he could cross safely, although it was so near as to make the experiment exceedingly hazardous. The company are not responsible for the result of such experiments, unless the engineer, after seeing the hazardous position of Harlan, could have avoided injuring him. Of course no amount of negligence on the part of a stranger would authorize a railroad engineer to run over him, if there was a possibility of avoiding it; but it is proved in this case, by the plaintiff's own witness, that the engineer did not see Harlan until he was killed, and that if he had seen him there was no possibility of stopping the engine in time to have avoided the injury. The failure to ring the bell on the engine and the sound of bells on the freight train might have misled Harlan, if he trusted to hearing alone, although the evidence on both sides clearly shows that the movements of the "pony" engine, without a bell, could be heard at least fifty yards. This, however, does not account for the failure of Harlan to see the engine, when he stepped from behind the cars on the side track. He was seven feet still from the main track, on which the switch engine was clearly in sight, and in motion, and it was about the middle of a clear day, between one and two o'clock. He must, therefore, either have been totally absorbed on other subjects, or have concluded to take the risks. There is no ground for holding the railroad company responsible for the

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result of such recklessness. The circuit court might have refused to submit such a case to the jury, had an instruction to that effect been asked. Certainly a verdict against the instruction should have been set aside.

The question discussed in this case in regard to the form of the petition, in view of the conclusion we have reached on the merits, we deem unnecessary to consider.

The judgment is reversed and the cause remanded. The other judges concur.

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**EDWARD FLETCHER, Respondent, vs. THE ATLANTIC & PACIFIC RAILROAD COMPANY, Appellant.**

1. *Negligence—When question of for court.*—Ordinarily the question of negligence is one for the jury, under proper instructions, but where there is no conflict in the evidence as to the facts, or where they are undisputed, the question whether they amount to negligence, or to contributory negligence, is one to be determined by the court.
2. *Railroad—Public crossing—Injuries—Failure to ring bell—Negligence direct and contributory.*—The failure of a railroad company to comply with the statute in ringing its bell or blowing its whistle on approaching a public crossing is negligence in law. But where the party receiving the injury contributes directly thereto, as where having an unobstructed view of the railroad, so as to know of the approach of a train in sufficient time to avoid the collision, he attempts to pass over a public crossing, above which is a signal to "look out for the cars," and is struck in so doing, his injury is directly caused by his own negligence, and he cannot make the failure of the company to ring its bell or blow its whistle the foundation of a claim for damages.

*Appeal from the Special Law and Equity Court of Jackson County.*

*J. N. Lilton*, for Appellant, cited: *Devitt vs. Pacific R. R.*, 50 Mo. 302; *Barton vs. Iron Mountain R. R.*, 52 Mo. 258; *Evans vs. A. & P. R. R. Co.*, 62 Mo. 59; *Smith vs. Union R. R.*, 61 Mo. 591; *Maher vs. Pacific R. R.*, ante p. 267; *Boland vs. Missouri R. R. Co.*, 36 Mo. 491; *Vinton vs. Schwab*, 32 Vt. 612; *Callahan vs. Warne*, 40 Mo. 136; 1 Greenl. Ev. §§ 44, 48; *Smith vs. Hann. & St. Joe. R. R. Co.*, 37 Mo. 292; *Norton vs. Ittner*, 56 Mo. 352; *Owens vs. Hann. & St. Joe. R. R.*,

58 Mo. 393; Isabel vs. Hann. & St. Joe. R. R., 60 Mo. 482; Shearm. & Redf. Neg., §§ 25, 36, pp. 27, 40; Karle vs. K. C. etc. R. R. Co., 55 Mo. 484; Artz vs. Chicago, R. I. & P. R. R., 34 Iowa, 160; Havens vs. Erie R. W., 41 N. Y. 296; Ernst vs. Hudson River R. R. Co., 39 N. Y., 61; 35 Ib. 9; Wilcox vs. Rome, W. & O. R. R. Co. 39 N. Y. 358; Baxter vs. Troy & Boston R. R. Co., 41 N. Y. 502; Nicholson vs. Erie R. W. Co., 41 N. Y. 525; Gonzales vs. New York & Harlem R. R. Co., 38 N. Y. 440; Wilds vs. Hudson River R. R. Co., 29 N. Y. 315; 24 Ib. 430; Gorton vs. Erie R. R. Co., 45 N. Y. 660; Morris & Essex R. R. Co. vs. Haslan, 4 Vroom (N. J.) 149; Ranyan vs. Central R. R. Co., 1 Dutch. (N. J.) 558; Chicago & Alton R. R. Co. vs. Fears, 53 Ill. 115; Lafayette & Ind. R. R. Co. vs. Huffman, 28 Ind. 287; Pittsburg & Ft. Wayne R. R. Co. vs. Vining, 27 Ind. 513; Toledo & Wabash R. R. Co. vs. Goddard, 25 Ind. 185; Steves vs. Oswego & Syracuse R. Co., 18 N. Y. 422; Sheffield vs. Rochester & S. R. R. Co., 21 Barb. 399; Brooks vs. Buffalo & N. F. R. R. Co., 25 Ib. 600; Chicago, R. I. & P. R. R. Co. vs. Still, 19 Ill. 499; C. C. & C. R. R. Co. vs. Terry, 8 Ohio St. 570; Evansville & C. R. R. Co. vs. Hiatt, 17 Ind. 102; Illinois Central R. R. Co. vs. Buckner, 28 Ill. 303; North Penn. R. R. Co. vs. Heilmann, 49 Penn. St. 60; Harlem R. R. Co. vs. Coyle, 5 P. F. Smith, 396; Chicago & A. R. R. Co. vs. Gretzner, 46 Ill. 74; Shearm. & Redf. Negl. §§ 25, 488; Finlayson vs. C., B. & Q. R. R. Co., 1 Dill, C. C. Rep. 579; R. R. Co. vs. Skinner, 19 Penn. St. Rep. 298; Phila. & Reading R. R. Co. vs. Hummell, 44 Penn. St. 375; R. R. Co. vs. Norton, 24 Penn. St. 465; Ft. W. & C. R. R. Co. vs. Evans, 53 Penn. St. 250; Fleytas vs. Pontchartrain R. R. Co., 18 La. 339; Jeffersonville, Madison, etc., R. R. Co. vs. Goldsmith, 47 Ind. 43; Maynard vs. Boston & M. R. R. Co., 115 Mass. 458; Munger vs. Tonawanda R. R. Co., 4 Comst. [N. Y.] 357; Vandergrift vs. Rediker, 2 Zab. 185; Cin., D. & H. R. R. Co. vs. Waterson, 2 Ohio St. 424; Tower vs. Worc. R. R. Co., 2 R. I. 404; Louisville R. R. Co. vs. Ballard, 2 Metc. (Ky.) 177; Gillis vs. Penn. R. R. Co., 59 Penn. St. 122; Hott vs. Wilkes, 3 B. & Ald. 304; Hounsell vs. Smith, 7 C. B. (N. S.) 731;

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Binks vs. South Yorkshire R. R. Co., 3 B. & S. 244 ; Phila. & Read. R. R. Co. vs. Spearen, 47 Penn. St. 300.

*Tichenor & Warner*, for Respondent, cited: Allen vs. Wil-lard, 57 Penn. St. 374-380 ; Greenleaf vs. Ill. Cent. R. R. 29 Iowa, 48 ; Wagn. Stat. 310, § 43 ; Owens vs. Hann. & St. Joe. R. R., 58 Mo. 386 ; Stoneman vs. A. & P. R. R. Ib. 503 ; Ta-bor vs. Mo. Valley R. R., 46 Mo. 353 ; Girard Passenger Rly. Co. vs. Middleton, Law & Eq. Rep. [1877] 504 ; Clayards vs. Dethick, 64 Eng. C. L. 437 ; Thompson vs. North Mo. R. R., 51 Mo. 190 ; Lloyd vs. Hann. & St. Joe. R. R. 53 Mo. 509 ; Brown vs. Hann. & St. Joe. R. R., 50 Mo. 466 ; Smith vs. Union R. R. Co., 61 Mo. 588 ; Radley vs. The Directors of the London & N. W. Rly., Law & Eq. Rep. [1877] 467 ; Baltimore & Ohio R. R. Co. vs. Mulligan [Md., 1877], Ib. p. 433 ; Huelsenkamp vs. Citizens' R. R. 37 Mo. 537 ; Tabor vs. Mo. Valley R. R. Co., 46 Mo. 356 ; Brown vs. Hann. & St. Joe. R. R., 50 Mo. 466 ; Whalen vs. St. L., K. C. & N. R. R. Co., 60 Mo. 323 ; Isabel vs. Hann. & St. Joe. R. R. Co., 60 Mo. 475 ; Ernst vs. Hudson River R. R. Co., 35 N. Y. 26 ; Kennayde vs. Pacific R. R. Co., 45 Mo. 262 ; Burham vs. St. L. & I. M. R. R. Co., 56 Mo. 338 ; Brown vs. N. Y. C. R. R., 32 N. Y. 601.

HENRY, Judge, delivered the opinion of the court.

This was an action by plaintiff to recover damages for injuries received by him under the following circumstances :

On the first day of February, 1872, plaintiff, who lived about two miles east of Kansas City, and one Cecil were in Cecil's wagon returning home from Kansas City. From Kansas City defendant's road runs in an easterly direction, and there is also a public road from Kansas City, running in the same direction, and for four or five hundred feet west of a public crossing of defendant's road by said public road, the two run parallel and not exceeding twenty-five feet apart.

The Novelty mills are about three hundred and sixty yards west of this crossing, and between said mills and a brick house standing about twenty-five feet from the railroad, and two hundred and seventy yards west of the crossing, plaintiff says he looked back

and saw no train approaching, but that he did not again look back until the accident occurred.

From the crossing, west, at any point on the public road within fifty or sixty yards, one can see the whole track west for a distance of a half a mile. Plaintiff testified: "If I had looked back at any time, along that fifty or sixty yards, I could have seen the train in time to have prevented the accident. I did not look for the train or listen for it. I did not think of it." Nor did Cecil, who was driving the team, look or listen for a train, but drove upon the crossing, when the wagon was struck by the locomotive, and plaintiff was thrown from the wagon and seriously injured.

At this crossing, across the dirt road, in plain view, was a wide board upon which, in large letters was printed, "Railroad Crossing! look out for the cars!" There was evidence on the part of plaintiff, tending to prove, that the bell was not rung, nor the whistle blown, on the train as it approached the crossing. The conductor and brakeman testified to the contrary, but we shall assume that the preponderance of the evidence was on the side of the plaintiff on that issue.

The accident occurred a few minutes after five o'clock P. M.—as soon after five o'clock as the train, moving fifteen or twenty miles an hour, could make a distance of between one and two miles. The exact distance from Kansas City to the crossing does not appear, but as plaintiff lived two miles east of the city, and the accident occurred before he reached home, it must have been less than two miles.

Plaintiff in his testimony stated that he knew that the train was to leave the city, going east, at five o'clock that afternoon; that he knew it was about five o'clock when he and Cecil were on the road going home, and that he had lived in that neighborhood since 1860, and near the defendant's road.

There was snow on the ground five or six inches deep, and to some extent it deadened the sound of a moving train.

At the close of plaintiff's testimony the defendant asked the court to instruct the jury, that upon the pleading and evidence



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the plaintiff could not recover, which the court refused. It is unnecessary to notice the others.

The jury found a verdict for plaintiff for \$650.00, and a motion for a new trial having been overruled, and a judgment for plaintiff rendered in pursuance of the verdict, defendant has brought the cause to this court by appeal. The failure of the employees of defendant to comply with the requirements of the statute, in regard to ringing the bell and blowing the whistle on approaching public crossings, was negligence, and, if plaintiff was injured in consequence of the neglect of that duty, he is entitled to recover, unless plaintiff's own negligence contributed directly to produce the result.

In the case at bar plaintiff's own testimony made out a case of negligence on his part, and we are asked to determine whether it was not such negligence as precluded plaintiff from recovering, and whether the court should not have given the instruction asked for by defendant, at the close of plaintiff's evidence. Ordinarily the question of negligence should be submitted to a jury, under proper instructions, but when there is no conflict of evidence, in regard to the facts relied upon as constituting negligence, it is the duty of the court to determine whether those facts do, or do not, constitute negligence; and we think that it is equally the duty of the court, where the facts are undisputed, to determine whether those facts of themselves constituted direct contributory negligence. (*Maher vs. The Atlantic & Pac. R. R. Co., ante* p. 267.)

Wharton in his work on the Law of Negligence (§ 384), says: "When a person knowingly about to cross a railroad track may have an unobstructed view of the railroad, so as to know of the approach of a train in sufficient time to clearly avoid the injury from it, he cannot, as a matter of law, recover, although the railroad company may have been also negligent, or neglected to perform a statutory requirement."

Shearman & Redfield on Negligence, (§§ 488, 488a,) are yet more clear and emphatic: "It is universally deemed culpable negligence for any one to cross the track of a railroad, operated by steam power, in full view or hearing of an approaching train,



or without taking any precautions (if any are reasonably within his power) to ascertain whether a train is approaching; and as a general, but not invariable rule, it is such negligence to cross without looking in every direction that the rails run, to make sure that the road is clear." "The statutes giving a right of action to persons injured by the neglect of a railroad company to ring a bell at a highway crossing, do not confer such right of action irrespective of the injured person's own negligence. One whose own fault has contributed to his injury, cannot take advantage of these statutes; nor is the defendant's omission to ring a bell any excuse for the plaintiff's omission to look up and down the track."

The case of *Gorton vs. The Erie R. W. Co.*, (45 N. Y. 662,) was one strikingly resembling the case at bar, in its facts, which as given by Allen, J., who delivered the opinion of the court, were as follows:

"The highway crossed the railroad at an acute angle and the plaintiff was moving along the road and across the railroad in a south-easterly direction, approaching the railroad from the north west, and the colliding train of cars approached from the west on the southernmost of the two railroad tracks. The course of the railroad, at that point, was in a direct line both east and west, and the plaintiff testified that when he got onto the track there was nothing to prevent him from looking both east and west; that is, that there was nothing, as he approached and reached the railroad track, to intercept or obstruct his view, or prevent his seeing the approaching train had he looked in that direction; that the space between the two tracks was three or four feet; that when he drove up to the north rail he made no effort to look west to see whether a train was coming; that he did not try to look west at that time."

It was shown that the bell was not rung nor the whistle sounded as required by statute.

At the close of the evidence defendant moved that plaintiff be nonsuited, upon the ground that he was shown to have been negligent, both in approaching and crossing the railroad track.

The court held that the motion should have been sustained. And Allen, J., observed; "It is not imposing an onerous duty upon the traveler crossing a railroad in broad day light, over which trains of cars were frequently passing, and are liable to pass at any time, to make use of the most common and lowest degree of observation and care, and to cast his eyes in both directions, and in every direction from which danger may be apprehended."

"He may not shut his eyes and stop his ears, and rush on regardless of the peril, and hold the railroad company as the insurer of his life, not only against the acts of its servants, but against his own suicidal negligence. The doctrine has been declared by this court, and re-affirmed, that a traveler approaching a railroad track is bound to use his eyes and ears, so far as there is an opportunity, and when by the use of those senses, danger may be avoided, notwithstanding the neglect of the railroad servant to give signals, the omission of the plaintiff to use his senses to avoid the danger is concurring negligence, entitling defendant to a non-suit."

The same doctrine was held in *Morris & Essex R. R. Co. vs. Haslan*, 4 Vroom. 149, and 33 N. Y. 147; *Runyan vs. The Central R. R. Co.*, 1 Dutch. 357; *Chicago & Rock I. R. R. Co. vs. Still*, 19 Ill. 508; *Chicago & Alton R. R. Co. vs. Grätzner*, 46 Ill. 74; *North Penn. R. R. Co. vs. Heilmann*, 49 Penn. 62; *The Bellefontaine R. W. Co. vs. Hunter, Adm'r*, 33 Ind. St. 336; *Harlan vs. St. L., K. C. & N. R. R. Co.*, *ante* p. 480.

In addition to the facts which are disclosed in the cases above cited, in the case at bar it appears that there was a board over the highway at the crossing with the words "Railroad Crossing! look out for the cars!" printed upon it in large letters. The statute requires the company to erect these at public crossings, and the duty thus imposed upon the company, certainly imposes a corresponding duty upon travelers on the highway to heed the warning given.

They have no more right to disregard it, than they would to disregard a similar warning from an individual stationed for that purpose by the company near the crossing. It would be a mockery of justice to require the company at considerable expense to

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erect these boards of warning, and at the same time hold that it is of no benefit to the company in a suit for damages, by one who, disregarding the warning, goes upon the road at the crossing and gets injured by a passing train.

These remarks of course apply only to those who can see and hear, and to a time when the printed warning can be seen.

The instruction asked for by defendant at the close of plaintiff's evidence should have been given, and the judgment with the concurrence of the other judges, except Hough, J. and Norton, J. not sitting, is reversed.

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GEORGE B. VAUGHN, Plaintiff in Error, *vs.* ALLEN TATE, Defendant in Error.

1. *Land and land titles—Quarter section corners, how determined.*—In exterior sections having less than the full number of acres, where the quarter section corners cannot be found, the deficiency will not be divided between the quarter sections as contemplated by the statute, but must fall on the quarter directly on the township or range line. In such case the regulations of the United States Land Department must prevail over the statutes of the State. Knight *vs.* Elliott, 57 Mo. 317.

*Error to Lewis County Circuit Court.*

*A. Hamilton*, for Plaintiff in Error.

*F. L. Marchand*, with *J. G. Blair*, and *J. C. Anderson*, for Defendant in Error, cited: Knight *vs.* Elliott, 57 Mo. 317.

HOUGH, Judge, delivered the opinion of the court.

This was an action of ejectment. The plaintiff and the defendant are adjoining proprietors, the defendant owning the south-east quarter and the plaintiff the eastern portion of the south-west quarter of section six, township sixty, range six west; and the rights of the parties are to be determined by the location of the boundary line dividing the south-east quarter from the

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south-west quarter of said section, the quarter section corner established by the United States surveyor, on the south line of said section, being lost.

No question of adverse possession is involved, as the defendant claims title only to the dividing line wherever that may be.

The section is an exterior one, and fractional, the south line thereof being in fact only seventy-five chains in length, although the patent issued by the United States, under which the defendant claims, calls for the south-east quarter containing one hundred and sixty acres, and the patent under which the plaintiff claims, calls for the south-west quarter containing one hundred and sixty-two and sixteen hundredths acres.

It being admitted that the plats and original book of entries of the United States surveyor are inaccurate, and that the south half of the section contains only about three hundred acres, it is obvious that one or both of the parties must sustain a loss, and the only question is whether the deficiency should be divided ratably between the two quarters, in accordance with the provisions of section 30 of the act relating to county surveyors (Wagn. Stat. 1312), or whether the defendant, as the owner of the south-east quarter, is entitled, in accordance with the United States laws and the regulations of the General Land office, to a full quarter section containing one hundred and sixty acres, thus throwing the entire deficiency upon the owner of the south-west quarter.

It is stipulated in the agreed statement of facts, on which the case was submitted, that if the former rule is adopted the plaintiff is entitled to recover, if the latter, then the defendant is entitled to recover.

The precise question here presented was considered and determined in the case of *Knight vs. Elliott* (57 Mo. 317), and it was there held, that in such cases the regulations of the Land department of the United States must control, and not the laws of the State.

Judgment of the circuit court, which was for the defendant, must therefore be affirmed; all the other judges concur, except Sherwood, C. J., who was absent.

Westberg v. The City of Kansas.

JOHN P. WESTBERG, Respondent, *vs.* THE CITY OF KANSAS, Appellant.

1. *Mayor—Marshal—Appointment of officer—Commission of—Evidence of what.*—Where a city ordinance authorizes the appointment of an officer by the mayor and marshal, his commission, signed by the mayor, is presumptive evidence of the concurrence of the marshal in his appointment.
2. *Municipality—Police officer—Removal of by Mayor—Claim for subsequent salary—Vested rights—Contract, etc.*—In suit by a policeman against the City of Kansas, for suspending and dismissing him from employment, and for the remainder of his salary thereafter unpaid, it appeared that, by its charter, the common council had power by ordinance (not to appoint but) to provide for the appointment of police officers; that the mayor was authorized to suspend, and, with the consent of the common council, to remove any officer, etc. On receipt of a communication from the mayor suspending an officer, the only action required of the council was to file the same. The records of the council showed that plaintiff was nominated as police officer by the mayor and confirmed by the city council; that a message was afterward received from him suspending plaintiff from his office on the police force, and recommending his removal therefrom for the unnecessary shooting of A. B. On the message was endorsed "received and action of the mayor confirmed."

"D. G., Clerk."

*Held*, that the manifest intent of the mayor was to permanently remove the officer, and that the approval of the city council, through its clerk, had reference to such purpose and not merely to a suspension from office; but even were the plaintiff only suspended from office, that he was not entitled—as against the city—to recover a salary during the period for which he was suspended, since plaintiff had no vested right in his office; nor had he had any contract with the city for his position, and if he had, the city had a right to sever it for misconduct.

*Appeal from Jackson County Circuit Court.*

*J. Brumback*, for Appellant, cited: *Philadelphia vs. Given*, 60 Penn. St. 140; *High Ex. Rem.* § 70; *Chart. Kas. City*, art. 4, §§ 7, 22; *Dill. Mun. Corp.* [1 ed.], § 188 and cases cited; *Ex parte Hennen*, 13 Pet. 230; 9 Wis. 258, 259; *Primm vs. Carondelet*, 23 Mo. 22; *State vs. Davis*, 44 Mo. 129; *State vs. Lingo*, 26 Mo. 498, 499; *Moore vs. Wingate*, 53 Mo. 405; *State vs. Common Council*, 9 Wis. 263; *Ex parte Hennen*, 13 Pet. 259, 260; *Holbrook vs. Trustees*, 22 Ill. 539; *Bowerbank vs. Morris*, Wall. C. C. R. 124; *U. S. vs. Bank Arkansas*, Hempst. C. C. 460; *State vs. Clark*, 52 Mo. 513; *Auditor vs. Benoist*, 20 Mich. 176; *Smith vs. The Mayor*, 37 N. Y. 518;

Kiley vs. Cranor, 51 Mo. 543 ; Dill. Mun. Corp. §§ 233-237, and cases cited ; Wright vs. Jacobs, 61 Mo. 23.

*White & Titus*, for Respondent, cited : Dill. Mun. Corp. [1 ed.], §§ 151, 174, 751 ; Stadler vs. Detroit, 13 Mich. 346 ; Shaw vs. Mayor, etc., of Macon, 19 Ga. 468 ; Same case, 21 Ga. 280 ; Mayor, etc., of Macon vs. Shaw, 25 Ga. 590 ; Carroll vs. Siebenthaler, 37 Cal. 193 ; Western Savings Fund Society vs. Philadelphia, 31 Penn. St. 175, 185 ; Nearns vs. Harbert, 25 Mo. 353 ; Mooney vs. Kennett, 19 Mo. 555 ; State vs. Oddle, 42 Mo. 214 ; Clarke vs. Dutcher, 9 Cow. 651 ; Mowatt vs. Wright, 1 Wend. 360, 364 ; Supervisors, etc., vs. Briggs. 2 Hill N. Y. 135 ; Same vs. Same, 2 Denio 39-41 ; Snelson vs. State, 16 Ind. 29, 31-33 ; Nelson vs. Milford, 7 Pick. 26, 27 ; The President, etc., of Bank of United States vs. Dandridge, 12 Wheat. 70, 73 ; Proprietors of Canal Bridge vs. Gordon, 1 Pick. 304, 307 ; The United States vs. LeBaron, 19 How. 78, 79 ; State *ex rel.* vs. Common Council of Jersey City, 1 Dutch. 530, 544 ; Dill. Mun. Corp. 218, § 183 ; State *ex rel.* Bryson vs. Lingo, 26 Mo. 496 ; Commonwealth vs. The President, etc., of St. Patrick's Society, 2 Binney, 441, 450 ; State *ex rel.* vs. Bryce, 7 Ohio, 414, 416 ; State *ex rel.* vs. Chamber of Commerce of Milwaukee, 20 Wis. 63, 71 ; Commonwealth vs. Sutherland, 3 Serg. & R. 145 ; State vs. Trustees of Vincennes University, 5 Ind. 89, 90 ; City of Madison vs. Korbly, 32 Ind. 74 ; Chart. City of Kans. [1870], p. 337, art. 4, § 7 ; *Ib.* p. 336, art. 3, § 36 ; Rev. Ord. City, c. 23, § 1 ; Dill. Mun. Corp. [1 ed.], §§ 188, 191 ; Rex vs. Richardson, 1 Burrows, 537, *et seq.* ; Dill. Mun. Corp. p. 228, note 3 ; Caulfield vs. State, 1 S. Car. 461 ; Western Saving Fund, etc., vs. Philadelphia, 31 Pa. 175, 185 ; Cameron vs. School District No. 2, 42 Vt. 507 ; Supervisors of Niagara vs. The People, 7 Hill, 511 ; City of Covington vs. Ludlow, 1 Metc. [Ky.] 295.

HENRY, Judge, delivered the opinion of the court.

On March 19, 1872, Westberg sued the City of Kansas for \$900.



The petition states that on or about May 2, 1871, the city, through its proper officers, employed, and duly appointed and confirmed Westberg, the respondent, in the capacity of policeman of the city, and the mayor and clerk of the city gave him a certificate, or commission, showing his employment as policeman for one year; that the city agreed to pay him \$75 per month for his services; that he entered upon the discharge of his duty and continued therein "until on or about the fifteenth day of May, A. D. 1871, when he was suspended by defendant from said employment, without provocation or cause, and remained so suspended from his duties aforesaid for several days; that plaintiff, after the said fifteenth day of May, A. D., 1871, offered to continue in and perform all the duties of policeman aforesaid for said defendant, but defendant wrongfully, and without cause, prevented plaintiff from fulfilling his said contract of employment, *by dismissing him*, and refusing to pay him for his services aforesaid."

Prayer for judgment for \$900.

The city filed an amended answer February 1, 1873, alleging: that the mayor and city clerk of the city issued to Westberg the certificate, or commission, mentioned in the petition, dated May 3, 1871 (giving a copy thereof); that the city did not, through its proper officers, employ, duly appoint or confirm him in the capacity of policeman; that he was not appointed as policeman otherwise than by being appointed by the mayor of defendant, and such appointment being confirmed by the common council of the city, by vote or resolution; that "he was not appointed by ordinance, nor pursuant or according to any ordinance;" that under color of the appointment mentioned in the answer, and without any other right, plaintiff acted and served as policeman from May 3, 1871, to May 15, 1871, and for such service the city paid, and he received, \$30 in full; that the city did not agree to pay him \$75 per month, or anything whatever; that after he was appointed policeman, as disclosed in the answer, and not otherwise, and received his commission, and on May 15, 1871, the mayor of the city, for good cause, suspended, and, by and with the consent of defendant, removed him from his office

and employment; that the city did not wrongfully and without cause prevent him from fulfilling his alleged contract of employment, nor wrongfully and without cause dismiss him and refuse to pay him for his services.

On motion of plaintiff the court struck out of this answer the words, "by ordinance." The city excepted to this.

Plaintiff replied to this answer, denying the allegations of new matter, except the payment of the \$30.

The issues thus joined were tried by the court without a jury, May 24, 1875, and judgment rendered against the city for \$1,078. The city the same day filed a motion for a new trial, which the court at the same term, on May 27, 1875, overruled. At the same term, and on June 5, 1875, the city tendered its bill of exceptions, which was allowed, when it filed an affidavit and gave bond and appealed.

The bill of exceptions discloses all the testimony on the trial.

Plaintiff read in evidence an ordinance of the city, approved May 2, 1871: To create, regulate and establish the police of the city, and to prescribe their duties and powers. The first section is as follows: "Sec. 1. The police of the city of Kansas is hereby created, which shall consist of 24 policemen and 2 sergeants. They shall be appointed by the mayor and marshal, subject to the confirmation of the common council in the same manner as other appointive city officers." Section 2 defined their duties. Section 3 fixed their pay at \$75 per month.

Plaintiff read in evidence his commission mentioned in the pleadings. He also read from the record of proceedings of the common council of the city the following entry: "May 2, 1871. The following nominations for policeman confirmed: John C. Beshar, John P. Westberg."

Thomas M. Speers, a witness for respondent, testified that he was city marshal of the city in 1871, and had charge of the police; that in May, 1871, Westberg was suspended, and he did not put him on duty after that; "that another man served in his place afterward, the balance of the year, and commenced at first meeting of the common council after plaintiff ceased to perform duty."

Respondent also read in evidence an ordinance passed June 25, 1869, providing for the trial and removal from office of city officers in certain cases. This ordinance provided, sec. 1: "That in all cases where any city officer of the City of Kansas, other than the mayor and council of said city, and those officers who are appointed by the mayor and council, shall be guilty of probable omission of duty \* \* or of malfeasance, \* \* or of any misdemeanor, \* \* such officer shall be subject to trial and removal from office *by the common council* as hereinafter provided."

Section 2 provided for charges in writing, notice to the party complained of, a trial before the common council, and in case of conviction, judgment of removal from office, &c.; but that "no judgment or sentence of conviction, and removal from office, shall be given against any officer at any trial without the concurrence of two-thirds of the council present and acting." The other two sections refer to, and regulate, details of the proceedings.

The city, at the time, objected to the reading of this ordinance of June 25, 1869, in evidence, because: 1, the law under which the ordinance was passed had been repealed in 1870; 2, the ordinance was invalid, because not supported or upheld by any law in force in 1871; 3, the law did not apply to the suspension or removal from office of policemen; 4, the ordinance was immaterial and irrelevant, and had been repealed by the charter of the city of March 16, 1870.

The court overruled the objections and received the ordinance in evidence, and the city excepted.

John C. Beshar, a witness for plaintiff, testified that he knew Westberg in 1871; that he was notified by the marshal that he was suspended; that he reported for duty several times afterward; that "I (witness) never knew of his removal." This was all the proof for respondent.

The testimony for the city consisted of several documents and the statements of two witnesses: Danied Geary, city clerk in 1871, and A. Mayer, city clerk in 1875. The documentary proofs were:

1. A message from the mayor of the city to the common council of the city, viz :

“MAYOR’S OFFICE, Kansas City, Mo., 15th May, 1871.

To the Honorable Common Council,

Gentlemen : I have this day suspended from duty the following policemen, to-wit : John P. Westberg and John C. Beshar. I would recommend their removal from the police force upon the following charges, to-wit : The unnecessary shooting of Michael Jones on the night of the 12th instant. I herewith enclose the statement of Michael Jones as to the manner of said shooting. Under all the circumstances of the case, as I learn them, these policemen were guilty of a flagrant disregard of duty and the protection of the citizens.

“I am, respectfully,

“WILLIAM WARNER, Mayor.”

2. An indorsement on this message made by Daniel Geary, the city clerk, viz :

“May 15, 1871 : Received, and action of mayor confirmed.

“D. GEARY, C. C.”

3. A part of the record of the proceedings of the common council of the city, of May 15, 1871, viz :

“May 15, 1871.

“A message was received from his Honor, the mayor, suspending policemen Westberg and Beshar, for unnecessarily shooting one Michael Jones. On motion, his action in that respect was confirmed.”

The defendant introduced as a witness Daniel Geary, who testified that he was city clerk in 1871, and that certain amendments of the records of the common council, made April 27, 1875, showing that plaintiff was removed from office in 1871, were proper, and that the records made in 1871 were incorrect in not showing that plaintiff was removed. These amendments were made by witness, A Mayer, city clerk in 1875, and the common council.

Plaintiff asked, and the court gave, two instructions. The first is to the effect that if the plaintiff was not removed from office, but only suspended, he was entitled to recover the amount

of his salary, unpaid, with interest from May 2, 1872. The second is to the effect that if on May 15, 1871, the common council intended to remove, but such intention was not expressed by the common council and mayor, and notice of the same was not conveyed to plaintiff during his term, there was no removal.

To the giving of these instructions defendant objected and excepted.

The defendant asked the following :

1. "If the court finds that the mayor of defendant suspended and, with the consent of the common council of defendant, removed plaintiff from the office of policeman, May 15, 1871, then the finding must be for defendant." (Given.)

2. "The message of the mayor, and the record of the proceedings of the common council, in evidence, show the removal of plaintiff from the office of policeman on May 15, 1871." (Refused.)

3. "The mayor, with the consent of the common council, could remove plaintiff, and without cause shown, or a trial or investigation." (Given.)

4. "On the pleadings and proofs the court must find for defendant." (Refused.)

The city duly excepted to the refusal to give instructions two and four.

Defendant filed a motion for a new trial, in due time, which was by the court overruled, and judgment was thereupon rendered for plaintiff, in accordance with the finding of the court, from which defendant has appealed.

Plaintiff's commission, read in evidence, was signed by the mayor of the city and recites that "plaintiff, on the 2nd day of May, 1871, was duly appointed and confirmed as policeman of said city," and although the ordinance provides for the appointment of policemen by the mayor and marshal, with the consent of the council, in the absence of any evidence to the contrary, the commission is sufficient evidence that the appointment was with the marshal's concurrence. Besides, as late as 1875, the records of the common council were so amended by the common council, as to make it appear that the plaintiff was *removed from*

office, and this is an admission by defendant that plaintiff was in office before that order was made.

The defendant contends that the charter of the city required the appointment to be made by ordinance. The 36th subdivision of art. 3, in connection with the first clause of the section, confers power upon the common council, by ordinance, *to provide for the appointment*, and not as the counsel insists *to appoint by ordinance*, and this answers the point made by him on the action of the court in striking from the answer the words "by ordinance."

It appears then that plaintiff was duly appointed policeman, but the defendant insists that he was duly removed. Plaintiff contends that he was not removed, but there is no controversy as to his suspension, or that he was legally suspended.

The 7th section of the act of 1870, amending and revising the city charter of the city of Kansas (Adj. Sess. Acts 1870, p. 333), authorizes the mayor to suspend, and with the consent of the common council to remove, any officer not elected by the people; and as the ordinance passed June 25, 1869, specifying on what grounds and in what manner such officers may be removed, is in conflict with the power conferred upon the mayor by sec. 7 of the amended charter, it was repealed by the adoption of that amended charter.

Sec. 2, art. 14 of that charter, continues in force all ordinances, regulations and resolutions, not inconsistent with the provisions of that act, and, by implication, repeals all that are in conflict with its provisions.

Was the plaintiff removed from office? In considering this question we shall disregard the testimony of Geary, who was clerk of the council in 1871, and the amendments of the record of the council.

The admissibility of that evidence was, to say the least of it, very questionable, and if it were a question to be determined by the weight of testimony, the record clearly showing one state of facts, and the evidence of the clerk, taken four years after, a different and contradictory statement, the court might very properly



have regarded the testimony of the witness as insufficient to overcome the record made by him in 1871.

Whether plaintiff was removed from office must be determined, then, from the mayor's official communication to the board, and the action of the board on receipt of that communication and such other cotemporaneous acts as throw light on the subject.

The action of the mayor, in suspending an officer, did not require the consent of the board. All the board had to do, on receipt of a communication from him suspending an officer from duty, was to file the same, and, if they thought proper, provide by resolution or otherwise for the employment of some other person to discharge the duties of the suspended officer.

What is meant by the official communication sent by the mayor to the common council, on the 15th of May, 1871, informing them that he had suspended the plaintiff and recommending his removal, upon a charge, which, if true, required his immediate dismissal from office?

We are not to expect the greatest exactness in the language employed by such officers, but to give it a liberal and reasonable construction, and ascertain, if possible, from the language employed what was, and then give effect to, the intention. It is evident that the mayor thought that plaintiff should be removed from office immediately.

The charge he makes against the officer is one of a heinous character, and the best interests of the community demanded his instant removal if it was true. The mayor knew that while he could suspend he could not remove plaintiff from office, without the concurrence of the council, and he therefore immediately suspends him, and removes him if the council shall consent. Did the council so understand that communication? Their action is thus expressed: "Received; and action of the mayor confirmed."

Why approve of what the mayor had done, if he had only suspended plaintiff? It did not require their consent or approval, for the moment they received that communication plaintiff was suspended, and all the common council had to do in the premises was, if they thought it necessary, to provide for employing another to perform the duties of policeman in plaintiff's stead.

He was not suspended for any definite period, and this strengthens our view of the transaction, and shows that the mayor expected immediate action on his recommendation of the removal of plaintiff. The mayor evidently thought that he should be instantly dismissed from the service. We think that the action of the common council had reference exclusively to that recommendation.

Neither the language of the record nor that of the mayor is as explicit as it should be, but if strictly and technically judged, there are but few proceedings of such nature that would be upheld by the courts. But supposing there was no removal from office, it is not controverted that he was suspended or that the suspension was legal. Can one *legally suspended* from office, who has not performed the service, recover the salary?

In *Smith vs. Mayor of New York*, (37 N. Y., 518) it was held that no claim could be brought for salary or perquisites against a municipal corporation, covering any period when the claimant was not actually in office, and the court so held on the ground that salary and perquisites are the reward of express or implied services, and, therefore, cannot belong to one who could not lawfully perform those services, although wrongfully hindered from occupying a position in which he might render them. We are not asked, nor do we propose, to announce a doctrine as broad as that in this case. Plaintiff here was not wrongly, but rightfully, hindered from performing the service, and his own gross misconduct led to his suspension. There was no contract relation between the city and the plaintiff, and if there had been, his misconduct would have justified the city in severing it. If one engage with another for a year's service, and prove unfit for it, the employer has a right to discharge him, without subjecting himself to a suit for the whole year's wages; and surely a municipal government, instituted by the people for their safety and protection, has the right to dismiss from its service an officer who abuses his trust, and so conducts himself as to be as much feared by the people as are those against whom he is selected to protect them.

The same doctrine announced in the case of *Smith vs. The Mayor of New York* was held by the Supreme Court of Michigan,

in the case of the Auditor of Wayne County vs. Benoist, 20 Mich. 176.

Primm vs. Carondelet (23 Mo. 32) involved the right of the city of Carondelet to repeal her ordinance, authorizing the appointment of city counsellor, and to discharge herself from any liability to the plaintiff for the salary he claimed for the two last quarters of the year 1853 for which he was appointed.

Ryland, J., said:

"The transaction between the City of Carondelet and the plaintiff cannot be viewed as a contract. The plaintiff was not bound by any terms to hold his office or situation of city counsellor for any length of time."

Again he says: "When the office was abolished nineteen days of a quarter had expired. For this sum he is entitled to recover, but for nothing after the office has been destroyed. Defendant had no vested right to the office, and he can claim no salary after the office has ceased to exist."

In State *ex rel.* Att'y Gen'l vs. Davis, (44 Mo. 131) Wagner J., said: "But the whole doctrine, upon which the case for plaintiff is placed, is without support. It proceeds upon the theory that a person in possession of a public office, created by the legislature, has a vested interest, a private right of property in it. This is not true of offices of this description in this country. They are held neither by grant nor contract."

After a tolerably extensive examination of cases, we have failed to find one where an officer, legally suspended from office, was permitted to recover for services, which he did not, and had no right to, render.

If a legally suspended officer can, notwithstanding his suspension, recover his salary, a suspension is to be coveted by him, for he could then lie in the shade and draw compensation for labor performed by some one else. In what condition would this place incorporated towns and cities? The duties imposed upon their offices are important, and there must always be some one in place to perform them.

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The law gives the corporation the right to suspend one, and this suspension is generally for some fault of the officer, and necessitates the employment of another to perform his duties.

If compelled to pay both, the city will hesitate to exercise the right to suspend, and be tempted to keep in office unfit and unworthy men, or expel from office, to their disgrace, those whose faults do not merit so extreme a punishment. We hold, therefore, that whether removed or suspended, plaintiff was not entitled to recover the salary, or any part of it, from the date of such removal or suspension.

Judgment reversed and cause dismissed. All the judges concur.

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SEMPLÉ, BIRGE & Co., Appellants, vs. JOHN ATKINSON, et al.,  
Respondents.

1. *Attorney—Power to compromise debt—Subsequent ratification.*—An attorney has no authority growing merely out of his employment to compromise a debt. And if the client accepts the fruits of the compromise, with knowledge of it, and without dissent, that may amount to a ratification, and such ratification would be equal to a previous authority.
2. *Principal and surety—Extension of note—What agreement will discharge surety.*—The execution of a deed of trust by a principal debtor, whereby property not subject to execution was made liable for its payment, is a good consideration for a promise to extend the time for payment of the note, and such an agreement will discharge the surety.

*Appeal from Bates County Circuit Court.*

*A. Henry*, for Appellants, cited: *Lippold vs. Heed*, 58 Mo. 213; *Thomas vs. Irwin*, 43 Mo. 162; *McDonald vs. Hulse*, 16 Mo. 502; *Brengle vs. Bushey*, 40 Md. 141; *Blackburn vs. Jackson*, 26 Mo. 308; *Williams vs. Boyce*, 11 Mo. 537; *Spears vs. Ledergerber*, 56 Mo. 465; *Walden vs. Bolton*, 55 Mo. 405.

*C. C. Bassett*, for Respondents, cited: *Burge Suret.* 206; 3 Den. 512; *Small vs. Smith*, 38 Mo. 478; *Benedict vs. Smith*, 10 Paige, 126.

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NORTON, Judge, delivered the opinion of the court.

This is an appeal from a judgment of the circuit court of Bates county, sustaining a motion to quash an execution for \$365.75 issued on a judgment obtained in said court by plaintiffs against the defendants.

The reasons assigned in the motion for quashing the execution are: 1, that the judgment on which it had been issued had been satisfied and paid; 2, that defendant Atkinson was only a surety on the note on which the judgment had been rendered; that plaintiff had previously caused an execution to be issued on the judgment, which was levied upon certain lands of the defendant Bigelow, who was the principal, and also on a threshing machine; that the land levied upon was claimed as a homestead by said Bigelow, and that after the levy was made the attorney of plaintiffs agreed with Bigelow that if he would give the said attorney, as agent of plaintiffs, his note for the amount of the debt and costs, and secure the same by deed of trust on the real estate which had been levied upon, he would extend the time of payment six months, release the said threshing machine, and also release Bigelow from any further obligation on said judgment; that this arrangement was agreed to by Bigelow, who executed his note to said attorney, payable in six months, for \$417, and also a deed of trust on the real estate mentioned to secure the same; that the costs were paid, the threshing machine restored to Bigelow, and the execution ordered to be returned.

This motion of defendants appears to have been treated as a petition, and all the material allegations were denied by plaintiffs, and the fact alleged to be that the note and deed of trust were taken as collateral security, and not in payment, and that the attorney had no authority to receive the note in payment of the debt, and that it was not so received; that the time of payment was only extended, and that this extension of time was made for the benefit of Atkinson.

The motion to quash the execution was sustained, and from this judgment plaintiff appeals.



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The evidence in the case tends to show that Atkinson was the surety of Bigelow on the note on which judgment was rendered and execution issued; that the first execution issued on the 3d of June, 1873, was levied on real estate of Bigelow, exempt from execution on the ground of its being his homestead, and also on one threshing machine, as the property of Bigelow; that subsequently thereto, the said Bigelow and the attorney of the plaintiffs made an arrangement under which Bigelow executed his note for \$417, including the principal, interest and cost of the judgment due in six months, and a deed of trust conveying the real estate claimed by him as a homestead to secure its payment; that upon the execution of said note and deed of trust the time was extended for the collection of the debt six months, the execution was ordered to be returned by plaintiff's attorney, and the threshing machine, which had been levied upon, was delivered to Bigelow, by the direction of plaintiff's attorney; that the real estate conveyed in the deed of trust was of the value of \$1000, according to the evidence of three witnesses, and of the value from five to seven hundred dollars, according to the evidence of the attorney to whom it was executed; that it was incumbered by a prior mortgage for about \$400; that default being made, at the end of six months it was sold to the brother of plaintiff's attorney at \$100, and after deducting the costs of sale, the remainder, \$86, was directed to be placed as a credit on the execution.

It is argued that the attorney could not bind his principal by such an arrangement as was made with Bigelow, unless authority had been given him to do so.

That an attorney has no authority, growing merely out of his employment in that capacity, to compromise the debt or claim of his client, has received the sanction of this court in *Spears vs. Ledergerber* (56 Mo. 465), and *Waldren vs. Bolton* (55 Mo. 405).

The principle invoked by counsel, however, does not apply in this case, as it appears from the evidence of the attorney himself that, although he had no authority to compromise the claim, he did have authority to extend the time of payment. The evidence shows that the time of payment was extended by him for six



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months, and if this agreement to extend the time was made on sufficient consideration, its effect would be to discharge the security. The execution of the deed of trust, whereby property not subject to sale on execution became liable for its payment, *was* a good consideration for the promise.

It was held in the case of *Smarr vs. Schnitter* (38 Mo. 478), that a security is released when the holder of a note agrees, on sufficient consideration, to extend the time of payment; and that a deed of trust given to secure the principal debtor in the note after its maturity, providing that no sale shall be made to enforce the security for eighteen months, was a sufficient contract to extend the time of payment.

It may also be observed that the evidence in the case tends to show that the whole arrangement between Bigelow and the attorney was intended as a settlement of the debt, as the property yielded up by Bigelow not subject to sale, but for his agreement that it should be so, was worth from \$700 to \$1,000, sufficient to satisfy the debt after paying off the prior incumbrance. That this was the intention, the fact of the threshing machine being given to defendant is further evidence.

Although the attorney, from his simple employment as such, may have had no authority thus to compromise, yet if the client accepted the fruit of the compromise, with knowledge of it, and without dissent, it might well amount to a ratification, and a subsequent ratification in such a case would be equal to a previous authority. (*Benedict vs. Smith*, 10 Paige, 126.)

The judgment is affirmed, with the concurrence of the other judges.

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JOSHUA ROBERTS, Respondent, vs. H. M. MOSELEY, et al., Appellants.

1. *Trust, acceptance of how established—Trustee—Title as against cestui que trust—Purchase of another's title at judicial sale—Notice—Record—Possession, etc.*—Where under a deed to a trustee for a married woman, his duty was simply to permit her to have the use and occupation of the land, his knowledge of the execution of the deed and his procurement of a copy for his own use, although

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he never exercised any control, was held, in the absence of any disclaimer, after the lapse of six years, to amount to an acceptance. And in such a case he cannot acquire title as against his *cestui que trust*, even by purchase at a judicial sale under a title superior to that conveyed to him as a trustee, and his grantee, under the sale with notice, actual or constructive, of the rights of the beneficiary and of her heirs, takes no better title. *Held*, also, that in ejectment by the grantee against the heirs, record of the trust deed imparted to him notice in law, and the facts that he was son-in-law of the trustee and knew that the heirs were in possession, and took the land under a quit-claim deed and for an inadequate consideration, and that the position of his grantor, as trustee, was a matter of public notoriety, were circumstances sufficient to warrant a finding of actual knowledge of defendant's title. And in such suit plaintiff cannot attack their title on the ground of fraud in the conveyance made to the trustees for their benefit.

*Appeal from Newton County Circuit Court.*

*N. H. Dale, with H. B. Johnson*, for Appellants, cited: *Welch vs. Allen*, 21 Wend. 147; *Nicoll vs. Walworth*, 4 Denio, 385; *Ex parte De Kay*, 4 Paige Ch. 403; *Ring vs. McCown*, 10 N. Y. 268; *Roberts vs. Moseby*, 51 Mo. 282; *Baker vs. Nall*, 59 Mo. 265; *Stacey vs. Rice*, 27 Penn. St. 75; *Bush's App.* 33 Ib. 85; *Cloud vs. Calhoun*, 10 Rich. [S.C.] Eq. 358; *Perry Trust*, §§ 259-269; *Tiff. & Bull. Trust*, 510-535; *Iddings vs. Brown*, 4 Sand. Ch. 239, 282; *DeWelt vs. Miller*, 10 N. Y. 402; *Kellogg vs. Wood*, 4 Paige Ch. 578; *Van Epps vs. Van Epps*, 9 Paige Ch. 237; *Slade vs. Van Vechten*, 11 Paige Ch. 21; *Walden vs. Bodley*, 14 Pet. 156; *Freeman vs. Howard*, 49 Me. 195; *Stewart vs. Chadwick*, 8 Iowa, 463; *Jones vs. Shadwick*, 41 Ala. 262; *Webster vs. French*, 11 Ill. 254; *Haythrop vs. Hook*, 1 Gill. & John. 270; *Murray vs. Ballou*, 1 John. Ch. 566; *Shepard vs. McEvers*, 4 John. Ch. 136; *Rinson vs. Toey*, 4 Yerg. 296; *Heth vs. Richmond F. & P. R. R. Co.*, 4 Gratt. 482; 2 Scribn. Dow. § 6; *Woodson vs. Pool*, 19 Mo. 340; *Bullard vs. Briggs*, 7 Pick. 533; *Godwin vs. Young*, 22 Ala. 553; *Duncan vs. Bryan*, 11 Ga. 63; *State vs. Merrill*, 1 Chan. [Wis.] 258; *Coffee's Admr. vs. Crouch*, 28 Mo. 106; *Smith vs. Walser*, 49 Mo. 250; \*30 Barb. 641; *Hill. Trust.*, 259, 830 and note 1; *Rogers vs. Brown*, 61 Mo. 187.

*C. W. Thrasher, with J. C. Cravens*, for Respondent, cited: *Nickolson vs. Gooch*, 85 Eng. C. L. R. p. 1010; *Hill. Trust.* pp.

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45, 163, 164 ; Tiff & Bull. Trust. 5S, 127, 128, 196 ; Perry vs. Calvert, 22 Mo. 361 ; Knox vs. Hunt, 18 Mo. 174 ; Turner vs. Turner, 44 Mo. 539 ; Price's Heirs vs. Evans, 26 Mo. 30 ; Wineland vs. Coonce, 5 Mo. 296 ; Howe vs. Waysman, 12 Mo. 169 ; Henderson vs. Dickey, 50 Mo. 161 ; Hill. Trust. 224 ; Ayers vs. Weed, 16 Conn. 291 ; Stacey vs. Elph, 1 Mylne & Keen, 195 ; Thornton vs. Winston, 4 Leigh, 152 ; Marr vs. Peay, 2 Murph. [N. C.] 85 ; Gilman vs. Hovey, 26 Mo. 280, 249 ; Bledsoe vs. Simms, 53 Mo. 305.

HENRY, Judge, delivered the opinion of the court.

This was a suit in ejectment, instituted by respondent against appellants, to recover possession of the following described lots of land in Newton county, to-wit: Lots one, two and three of the south-west quarter of section number six, township twenty-six, range thirty-one. The defendants are the only sons, and only heirs at law, of Ann M. Moseley, deceased. In 1853, Hugh Armstrong owned the land in controversy and conveyed it to George W. Moseley, the husband of Ann M. Moseley. On the same day, Geo. W. Moseley re-conveyed said land to said Hugh Armstrong as trustee, to hold the same "for the sole use and benefit of the said Ann M. Moseley, her heirs and assigns forever, and in further trust that she should have the use and occupation of said land, and take and enjoy the rents and profits of the same, for her sole use and benefit." This and the deed from Hugh Armstrong to George W. Moseley were of the same date, and recorded on that day.

It appears from the evidence that George W. Moseley at the date of this transaction was insolvent, and on an execution issued on a judgment against him in favor of Shapleigh, Day & Co., the sheriff of Newton county levied on the land in controversy, and, in 1854, sold it, as the law directed. At that sale one Chenault became the purchaser, and received a deed therefor from the said sheriff. In October, 1855, he conveyed it by quit-claim deed to one Crouch, who, in October, 1859, conveyed the same, by quit-claim deed to Hugh Armstrong, and plaintiff, Roberts, claims by purchase and conveyance, Armstrong's title.

There was a trial in the circuit court, without the intervention of a jury, which resulted in a judgment for plaintiff, from which defendants have appealed to this court.

The answer of defendants set up, as an equitable defense, that Armstrong was a trustee for their mother, Ann M. Moseley, and that plaintiff had notice, when he purchased from Armstrong, that Armstrong held the land as trustee, under said conveyance from George W. Moseley.

Plaintiff filed a replication denying each of said allegations, and also denying that Armstrong ever accepted the trust.

Many questions are discussed, in the briefs of counsel, which we deem it unnecessary to consider, in the view we have taken of what we regard as the principal question in the case. The fact that the deed of trust, from Geo. W. Moseley to Armstrong, was executed and recorded on the same day that Armstrong conveyed the property to Moseley; that Armstrong repeatedly declared that the property belonged to Mrs. Moseley; that, after Armstrong's death, a copy of the deed was found among his papers, leaves no doubt that he knew that the deed of trust had been executed, and that he was named as trustee in the deed. Did he accept the office of trustee? He never disclaimed it.

From 1853, the date of said deed, to 1859, the date of the deed from Crouch to himself, with full knowledge of the existence of the deed, not a word of disclaimer does he utter, but, on the contrary, the preponderance of the evidence is to the effect that he was, during that time, claiming and exercising control over the premises. In what capacity? Certainly not as owner in his own right, for he had himself conveyed the land to Geo. W. Moseley in 1853, and his claim, under the deed from Crouch, did not originate until 1859. After a lapse of years the acceptance of the trust may be presumed, even when no act has been done by the trustee to indicate an acceptance. In the case at bar there was no act for the trustee to perform. His duty, under the deed, was simply to permit the beneficiary, Mrs. Moseley, to have the use and occupation of the land, and if he had never exercised any control over the property whatever, the fact that he knew of the execution of the deed and procured a copy for his own use,

would amount to an acceptance, in the absence of a disclaimer, by word or act, after the lapse of six years.

This case was before the court at the January term, 1873, and is reported in 51 Mo. 282, and the opinion of the court by Wagner, J., and the separate opinion of Judge Adams, then delivered, fully sustain the foregoing views. A trustee, who holds the legal title for the use of another, will not be permitted to deal with the property for his own benefit. He cannot purchase an outstanding title, and hold for his own use against his *cestui que-trust*; and it makes no difference in his favor, that he purchased, as in the case at bar, at a judicial sale, under a superior title to that conveyed to him as trustee. (*Jewett vs. Miller*, 10 N. Y. 402; *Kellogg vs. Wood*, 4 Paige Ch. 579; *Van Epps vs. Van Epps*, 9 Paige Ch. 238.) If the plaintiff had actual or constructive notice of the rights of Mrs. Moseley, under the deed of trust, he stands in the same relation, to her and the property, in which Armstrong, his grantor, stood. Did he have such notice? He had the notice imparted by the record of the deed and this was sufficient, but in addition to this, Mrs. Moseley and the defendants were in actual possession of the land at the date of plaintiff's purchase.

Plaintiff lived in the neighborhood of this land, was the son-in-law of Armstrong, and it was a matter of public notoriety, as some of the witnesses testify, that when Armstrong was "renting out" the land he was acting for Mrs. Moseley.

These facts would have warranted a finding that plaintiff had actual notice of the defendant's title. The consideration paid for the land by Armstrong was \$230. It was worth at least \$1,500.

He received a quit-claim deed, and executed the same character of deed to the plaintiff. This circumstance, connected with the other well established facts in the case, indicates knowledge on the part of both Armstrong and plaintiff that there was an infirmity in the title which plaintiff acquired.

To permit plaintiff's title to prevail against the *cestui qui trust*, under the circumstances disclosed by the evidence in this case, would be a reproach to a court of equity, and a license to

trustees to speculate in the property confided to them, to the destruction of the interests of the beneficiaries.

We have not overlooked the issue of fraud made by the pleadings, but conceding (not deciding however) that there was fraud in the conveyance from Geo. W. Moseley to Armstrong, the latter could not avail himself of it against Mrs. Moseley or her heirs, to hold the property for himself against them. Creditors could; and we presume that the execution in favor of Shapleigh, Day & Co. was levied upon the land in that view, and if Chenault or Crouch had held the title he acquired, and sued for the land, he might have attacked the deed from Moseley to Armstrong for fraud. The trustee, if he purchased in good faith to protect the interest of his *cestui que trust*, would probably be permitted to allege the fraud in the deed to himself as trustee, on a settlement of accounts with the beneficiary, on a claim of credit for the money expended by him in the purchase of the land under the circumstances disclosed herein.

His grantee, with notice, a trustee by operation of law, has no other rights than had the trustee named in the deed.

We express no opinion as to whether plaintiff is entitled, in this case, to the amount of purchase money paid by Armstrong, or by himself, if the amount he paid was less than the amount paid by Armstrong, with interest. It is conceded by Mr. Johnson of counsel for defendants that he has.

The judgment, therefore, will be reversed and remanded with directions to enter a decree vesting in the defendants any title plaintiff may have acquired under the deed from Armstrong to him, and that plaintiff be allowed the amount actually paid by him to Armstrong for the land, unless it exceed the amount paid by Armstrong to Crouch for the land, in which event plaintiff will be allowed that amount with interest from the date of payment at the rate of six per cent. per annum, and that this be made a charge and lien upon the land. The other judges concur, except Sherwood, C. J., who is absent.



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Knight v. Cherry, et al.

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NELSON KNIGHT, *et al.*, Plaintiffs in Error, vs. JAMES CHERRY, *et al.*, Defendants in Error.

1. *Equity—Injunction—Judgment—Cotemporaneous agreement as to satisfaction by payment of a less amount—Co-defendants, release of part.*—A defendant in a litigated case, who has consented to a judgment for a certain sum, agreed upon as fixing the real amount of the plaintiff's debt or damages, cannot satisfy such judgment by the payment of a smaller sum, on the ground that there was a prior or contemporaneous parol agreement that such smaller sum should be received in full satisfaction thereof.

*Error to Dade County Circuit Court.*

Henry Brumback, for Plaintiffs in Error.

I. Contracts made prior to, or contemporaneously with, the entering of judgments are allowed in evidence for the purpose of enjoining, annulling, or controlling these same judgments. In other words, contracts relating to controversies shall be enforced notwithstanding it is a part of the contract that a judgment shall be suffered. (Hil. Inj. pp. 201, 206, 208, 228; Keighler vs. Savage, 12 Md. 383; Gage vs. Cassidy, 23 How. 109.)

II. The alleged contract does not lack consideration. The compromise of a doubtful claim is a good consideration for a contract. (Reilly vs. Chouquette, 18 Mo. 226; Livingston vs. Dugan, 20 Mo. 102.)

N. Gibbs, for Defendants in Error.

HOUGH, Judge, delivered the opinion of the court.

The petition in this case alleged that in the year 1867 the defendant Cherry sued the plaintiffs, Knight and Wilson, and one Rhoades, for the conversion of certain personal property; that Rhoades was served but made default; that plaintiffs, Knight and Wilson, appeared to the action, and after a trial, in which the jury failed to agree, "it was agreed by and between plaintiffs and said Cherry, that if plaintiffs would consent and agree that judgment might be rendered by the court against them and

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said Rhoades, in favor of said Cherry, for the sum of five hundred dollars and costs, said Cherry would release these plaintiffs on payment by them of two-thirds thereof, and would not enforce said judgment, so to be rendered against plaintiffs, for any sum exceeding two-thirds thereof, and would not attempt to collect of these plaintiffs more than two-thirds of the same; that pursuant to said agreement plaintiffs consented that judgment might be rendered against them by said court as aforesaid, and that the same was rendered accordingly; and, said Rhoades having failed to answer as aforesaid, the court heard the testimony and assessed the damages as against (him) and rendered judgment against him together with the plaintiffs as aforesaid, in the sum of five hundred dollars." The petition further alleged that the plaintiffs have paid said Cherry two-thirds of the amount of said judgment, but that in violation of his said agreement, said Cherry directed execution to be issued, and execution had been issued against plaintiffs for the balance of said judgment and costs, and the defendant Caldwell, who was sheriff, threatened to levy the same on the property of plaintiff; that defendant Cherry was a non-resident, and that Rhoades was insolvent. Plaintiffs prayed that the sheriff might be enjoined from making any levy or sale under said execution, and that defendant, Cherry, should be perpetually enjoined from enforcing said judgment against the plaintiffs. To this petition there was a demurrer which was sustained by the court and final judgment rendered thereon for the defendants.

The only question presented is as to the sufficiency of the petition. It must be taken for granted in this case that the judgment correctly ascertained the amount to which the plaintiff was entitled. This judgment, so far as Cherry is concerned, is as much a judgment against Knight and Wilson, for the whole amount thereof, as if they were the only parties thereto, and in determining the effect of the agreement the judgment may be considered as one against them alone. Can a defendant in a litigated case, who has consented to a judgment for a certain sum, agreed upon as fixing the real amount of the plaintiff's debt or damages, satisfy such judgment by the payment of a

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smaller sum, on the ground that there was a prior or contemporaneous agreement that such smaller sum should be received in satisfaction thereof? After a somewhat extended examination, we have been unable to find any case which goes to this extent, and we deem it impolitic to add this to the list of cases in which the verity of judicial record may be questioned by parol.

There are numerous cases to the effect that where judgment has been confessed for a certain sum, not as an ascertainment of so much *actual* indebtedness, but only as security for so much as might thereafter be ascertained to be due, an attempt to collect the whole amount of the judgment would be such a fraud as would authorize the interposition of a court of equity. (*Keighler vs. Savage Manf'g Co.*, 12 Md. 383.)

The case of *Briggs vs. Law*, (4 Johns. Chy., 22) when narrowly examined, will be found to go no farther. In that case the judgment bond, on which the judgment sought to be enjoined was entered, was given to the obligee as a security which was to be enforced ratably in a certain contingency, and the chancellor carried out the agreement. The facts in that case are rather obscurely reported, but we think we state the point involved correctly. We cannot find that the case has ever been cited in any subsequent decision in New York.

In the case of *Wright vs. Barr*, (53 Mo. 340) a party permitted a judgment to be entered against him, for the purpose of securing a debt, upon an agreement that no action should be taken to enforce such judgment without notice to him; and the plaintiff therein having fraudulently used the same to procure title to certain real property of the defendant, the sheriff's sale was set aside. These cases proceed upon the same principle which allows an absolute conveyance to be shown to be a mortgage, and which restricts the holder of any security to the recovery of the sum actually due. But to permit a judgment which it is admitted represents an actual liability to be varied by parol, is as clearly against the policy of the law as it would be to allow the terms of a promissory note, given for an actual indebtedness, to

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be varied by proof of a prior or contemporary agreement that the payee would accept a less sum in satisfaction thereof.

We think the court did right to sustain the demurrer and the judgment will therefore be affirmed. All the judges concur.

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**THOMAS EVANS, et al., Appellants, vs. JACOB SNYDER, et al.,  
Respondents.**

1. *Land—Title claimed under administration sale—Proof as to order of sale, what necessary.*—In ejectment for land, the title to which defendant claims under an administration sale, the failure of the record of the probate court to show an order authorizing the sale, is at law a fatal defect, and incapable of being supplied by proof *aliunde*, whether it be notice, report or approval of sale, or administrator's deed. Such order has the same relation to administration sale as a judgment does to an execution sale. But where it appears that the land was sold above its appraised value and the proceeds were applied to the relief of other lands of plaintiff, evidence of these facts will create a clear equity in favor of defendant.
2. *Equitable estoppel.*—Where they stand silently by for years, while the occupant is making valuable and lasting improvements on the property, and redeeming it from the lien of the ancestor's debts, his heirs will be estopped from afterward asserting their claim.

*Appeal from Henry County Circuit Court.*

*J. B. Gantt*, for Appellants, cited: *Bompart vs. Lucas*, 21 Mo. 598; *Halleck vs. Guy*, 9 Cal. 181, 195; *Minnesota Co. vs. St. Paul Co.*, 2 Wall. 609; *Doe vs. Bowen*, 8 Ind. 197; *Speck vs. Wohlien*, 22 Mo. 310; *Mitchell vs. Bliss*, 47 Mo. 353; *Fithian vs. Monks*, 43 Mo. 502; *Shriver's Lessee vs. Lynn*, 2 How. 43; *Hawkins vs. Hawkins*, 28 Ind. 66; *Babbitt vs. Doe*, 40 Ind. 355; *Frye vs. Kimball*, 16 Mo. 25; *Wagn. Stat.* §§ 10, 25-27, pp. 94-97; *Bank of Hamilton vs. Dudley's Lessee*, 2 Pet. 523; *Medlin vs. Platte Co.*, 8 Mo. 235; *Milan vs. Pemberton*, 12 Mo. 598; *Valle vs. Fleming*, 19 Mo. 462, 463; *Denison vs. St. Louis Co.*, 33 Mo. 168; *Stark. Ev. Mar.*, p. 257; *Gray vs. Brignardello*, 1 Wall. 627; "The Monte Allegre," 9 Wheat. 616; *Young vs. Bowyer*, 9 Gratt. 336; *Strouse*

vs. Drennan, 41 Mo. 301, 302; Roberts vs. Casey, 25 Mo. 584; Ror. Jud. Sales, §§ 487, 488, p. 177.

*B. G. Boone*, for Respondents, cited: Fry vs. Kimball, 16 Mo. 9; Wolf vs. Wohlien, 32 Mo. 124; Tutt vs. Boyer, 51 Mo. 425; McVeigh vs. McVeigh, 51 Mo. 406; Jones vs. Manly, 58 Mo. 559; Pattee vs. Thomas, 58 Mo. 163; Strouse vs. Drennan, 41 Mo. 289; Perry vs. Towle, 48 Mo. 148; Castleman vs. Relfe, 50 Mo. 593; Jackson vs. McGruder, 51 Mo. 55; 17 Mo. 442; Grignon's Lessees vs. Astor, 2 How. 319; 12 Wend. 553; 4 Wend. 440; 2 Wall. 216, 319, 340; 3 Wall. 396; 51 Mo. 406, 425; 55 Mo. 264; 18 Ohio, 179; 6 Grat. [Va.] 320; 8 Dana, 182; 6 Bush, 367; 4 Bush, 777; 5 Tex. 351; 25 Tex. 430; 20 Ib. 465; 28 Mo. 374; 23 Mo. 207; 14 Mo. 552; 11 Martin, [La.] 615; 41 Ala. 602; McLaughlin vs. Daniel, 8 Dana, 182; 3 Blackf. 293; 7 Blackf. 268; 9 Ind. 1; 24 Ind. 264; 6 Iowa, 219; 7 Iowa, 97.

SHERWOOD, C. J., delivered the opinion of the court.

Ejectment for lands in Henry county. Plaintiffs claim those land- as heirs of their ancestor, William Evans, Sr., who died seized in fee, and defendants claim under an administration sale, both parties thus claiming William Evans, Sr., as the common source of title. Plaintiffs' ancestor was indebted at the time of his death, and the lands were sold for the payment of such indebtedness. The answer tendered the general issue, and also an equitable defense, to the effect that the lands sold were subject to the payment of decedent's debts, the personality being insufficient; that they were sold for and applied to that purpose, thus relieving other of decedent's lands from being sold, and thus greatly benefiting his heirs. This portion of the answer concludes with a prayer for special and general relief. On the hearing, the court gave judgment in favor of the defendants, such as is usually rendered in actions at law, evidently holding, as shown by the declarations of law given and refused, that defendants had acquired the title. We regard this action of the lower court as erroneous. The proceedings touching the administration sale are sufficiently regular, except that the records of the probate court

show *no order authorizing the sale*. This was clearly shown by the testimony and admitted by the defendants. Such a defect is a *fatal* one, and incapable of being supplied by any thing else, whether consisting of a notice of sale, report of sale, approval thereof, or administrator's deed. The order of sale in cases of this sort, occupies the same relation to a sale by an administrator, that a judgment or decree does to an execution sale by a sheriff. A somewhat different result seems to have been reached in *Tutt vs. Boyer* (51 Mo. 425), but this was by a divided court, and even that case does not announce, in all its broadness, that an administration sale can be upheld without an order therefor whereon to base it. And if it did, we should not follow it.

But although the defendants had no legal defense to the action, by reason of the foregoing defect, yet their equitable defense is worthy of greater consideration. For the lands, though appraised at only \$340, sold for \$360, and the proceeds of the sale were applied in relieving other lands which the plaintiffs still retain, freed from the burden of indebtedness. This latter circumstance, although the sale was void, creates a clear equity in favor of defendants. (*Jones vs. Manly*, 58 Mo. 559 and cases cited.) In addition to that, this suit was not brought until November, 1873, while the sale to Peelor occurred in February 1866, and the deed was made to him, by the administrator, in May of that year. Meanwhile, Peelor has sold the lands thus bought by him, and conveyed the same by warranty deed to his co-defendant, Snyder, and the lands, wild and unimproved when bought, have been improved and cultivated, and the plaintiffs, who sue only for four-sevenths of the lands (the other three heirs being unwilling to join in the suit), have stood silently by for years, living, with the exception of one of them, in the immediate neighborhood, witnessing the defendants redeeming the lands from the lien of their ancestor's debts, and their labor enhancing the lands thus purchased.

Under such circumstances as these, plaintiffs do not occupy an attitude which entitles them to very favorable consideration by a court of equity.



In regard to the question of *laches* and equitable estoppel, we refer to our recent decisions of *Landrum vs. Union Bank* (63 Mo. 48), and *Collins vs. Rogers* (Id. 515).

As the cause was tried on the wrong theory, that of the acquisition of title at the administrator's sale, notwithstanding the fact that there was no order therefor, and declarations were given to that effect, we shall reverse the judgment and remand the cause, in order that the court below may properly examine into and adjust the equities of the case between the parties litigant, in a manner conformable with this opinion, and the authorities herein cited. All the judges concur.

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THEODORE A. SHAW, Plaintiff in Error, *vs.* WILLIAM PADLEY,  
Defendant in Error.

1. *Practice, civil, agreed facts, how treated on appeal.*—Facts agreed upon in a case are, on appeal, to be treated as though found by a jury in a special verdict.
2. *Mortgage—Judgment—Pendente lite—Sales under mortgage and execution—Rights acquired under—Record—Notice.*—A mortgage upon land executed after issue but before service of a petition in ejectment, does not subject the holder thereunder to the liabilities of a purchaser *pendente lite*; and a sale under such mortgage will hold as against a sale under execution on a judgment obtained in such suit, although the mortgage was recorded after judgment, provided only that the record was prior to the date of the execution. Where, however, the purchaser under the mortgage was also attorney for the plaintiff in the judgment, and the judgment was rendered with his assent and approval, he and any purchaser under the mortgage, with knowledge of the facts, would be estopped from asserting his title as against one holding under the execution sale.

*Error to Bates County Circuit Court.*

*F. J. Galloway, with E. J. Smith, for Plaintiff in Error,*  
cited: *Davis vs. Ownby*, 14 Mo. 170; *Valentine vs. Havener*,  
20 Mo. 133; *Stillwell vs. McDonald*, 39 Mo. 282; *Reed vs.*  
*Ownby*, 44 Mo. 204; *Marr vs. McIntosh*, 21 Mo. 541; *Peyton*  
*vs. Rose*, 41 Mo. 257; *Freem. Judg.* §§ 195, 200; *Allen vs.*

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Mandaville, 26 Miss. 397; Edwards vs. Bank Smith, 35 Ga. 213; Herrington vs. Herrington, 27 Mo. 560; Murray vs. Ballou, 1 Johns. Ch. 576; Lyle vs. Bradford, 7 Mon. 116; 2 Sugd. Vend. 544, 1045; 1 Vt. 318; Kellogg vs. Fancher, 23 Wis. 21; Wickliff vs. Breckenridge, 1 Bush. 443; Miller vs. Sherry, 2 Wal. 237; Warring vs. Warring, 7 Abb. 472; Goodwin vs. McGibee, 15 Ala. 232.

*U. C. Bassett*, for Defendant in Error, cited: *Henri vs. The Grand Lodge, &c.*, 59 Mo. 581; *Inhabitants of Brookfield vs. Carter*, 57 Mo. 315; *Curtis vs. Curtis*, 54 Mo. 351.

NORTON, Judge, delivered the opinion of the court.

This was an action brought before a justice of the peace to recover damages for an alleged trespass of defendant, in cutting timber on the lands of plaintiff.

Defendant appeared. and on his plea of title the cause was certified to the Bates Circuit court for trial.

The cause was tried by the court without the intervention of a jury, and on the trial it was agreed that the title to the land on which the trees were cut was, according to the record, in one Jesse P. Harrell on the 13th March, 1871, and that Padley, the defendant, was at that time in possession of the land; that on the 2d day of August, 1871, said Harrell, by his attorney, T. J. Galloway, filed in the office of the circuit clerk of Bates county his petition in ejectment against said Padley, to recover the possession of said lands; that the petition and writ were served on Padley the 11th day of August, 1871, and in November, 1871, Padley filed answer alleging that deed to Harrell was fraudulent; that on the 7th of August, 1871, Harrell executed to said T. J. Galloway a mortgage to said land, with power of sale to secure him in the payment of a note for one hundred and fifty dollars, which said mortgage was recorded in the recorder's office of Bates county, on the 21st of November, 1872; that on the 7th day of August, 1872, by the consent and agreement of said plaintiff, Harrell and his attorney Galloway, and the defendant, Padley, and his attorneys Bassett and Johnson, the circuit court

of Bates county rendered a judgment in the ejectment suit in favor of plaintiff, for the possession of said land and for costs, and also a judgment for defendant for the sum of four hundred dollars against the plaintiff, which was declared to be a lien on said land, with a stay of execution for eleven months; and it was further adjudged that the defendant was to keep the crops then being grown and cultivated on said land; that on the 24th day of November, 1873, the said land was sold under the said mortgage of Harrell to Galloway, and plaintiff, Shaw, became the purchaser, receiving a deed from the trustee, which was duly recorded in the recorder's office on the 25th day of November, 1873.

It appears that execution regularly issued on the said judgment, in favor of Padley against the said Harrell, and a sale was had under the same, of said lands, on the 27th of November, 1871, at which sale said C. C. Bassett became the purchaser, and received a deed to the same; that prior to said execution Harrell had been put in possession of said land, and that on the 4th of February, 1874, by the authority of said Bassett, he had cut and carried away timber trees from said land, worth fifteen dollars.

The court rendered judgment for defendant on the above state of facts, from which plaintiff has appealed to this court, and insists upon a reversal of the judgment, on the ground that the facts agreed upon will not support the finding and judgment pronounced upon them.

It appears from the bill of exceptions that the facts included in the agreed statement were all the facts that were before the court, and they are to be treated as if they had been found by a jury in a special verdict. Considering them in this light, the only question presented for our determination is as to whether the plaintiff acquired a better title to the land on which the alleged trespass was committed, by virtue of the sale made under the mortgage, than was acquired by Bassett, the lessor of defendant, by virtue of the sale under the execution which was issued on the judgment of Padley, obtained in the ejectment suit brought against him by Harrell.

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The mortgage made to Galloway having been executed on the 7th of August, five days before the service of the petition and writ upon the defendant in the ejectment suit of Harrell vs. Padley, conveyed to him the legal estate, without casting upon him the liabilities and obligations of a *pendente lite* purchaser, inasmuch as a *lis pendens* is not created, or does not exist until service of the writ or summons upon the defendant.

Galloway, instead of putting his mortgage on record, put it in his pocket till after the judgment was rendered in August, 1872, by his consent and agreement, as attorney for Harrell in the suit of Harrell vs. Padley, and if he were the plaintiff, as purchaser under the mortgage, he would be estopped by his conduct from setting up any right thus acquired against a purchaser, under an execution issued upon a judgment to which he had thus assented, or if the plaintiff in this case, who bought under a sale made in pursuance of the power in the mortgage to Galloway, purchased with a full knowledge of Galloway's action in the premises, he would occupy the like position. There is nothing in the agreed statement of facts tending to show this.

The record shows that the deed of mortgage, by virtue of which plaintiff claims the land on which the trespass was committed, although not recorded before the rendition of the judgment under which Bassett, the lessor of defendant, claims, was duly recorded before any execution issued on said judgment, and that the land was sold under the mortgage before the sale under the execution made to Bassett. From the facts as presented in the record, the plaintiff was entitled to a judgment, and it should have been so rendered.

It will be observed that the date of the sale under the execution, as copied in the agreed statement of facts, is the 27th of November, 1871. This is evidently a clerical mistake made in the bill of exceptions, and we have so treated it. As the judgment was rendered August, 1872, with a stay of execution for eleven months, an execution could not therefore have issued till 1873, which latter year we take to be the true time of the sale, instead of 1871.

The judgment is reversed and the cause remanded. The other Judges concur, except Sherwood, C. J., absent.

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Withhouse v. Atl. & Pac. R. R. Co.

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HENRY WITTHOUSE, Respondent, vs. ATLANTIC & PACIFIC  
RAILROAD Co., Appellant.

1. *Practice, civil—Corporation, appearance of to suit.*—The appearance of a corporation to a suit is an admission of its corporate existence and dispenses with the necessity of establishing that fact by evidence.
2. *Practice, civil—Bill of exceptions—Instructions, loss of.*—The statement contained in a bill of exceptions that the instructions were not copied therein because they had been taken away by the jurors or lawyers and not returned, will not warrant a reversal in the absence of any proof that they were not before the court on hearing of motion for new trial or proof of any efforts to supply their loss.
3. *Damages—Railroad—Failure to fence—Point of accident, etc.*—When stock get upon the track of a R. R. Co. in consequence of the failure of the corporation to fence its track as required by statute (Wagn. Stat. § 43, 310), the road is liable, regardless of the question at what point on the track the stock was killed.
4. *Instructions—Refusal of.*—Instructions substantially embodied in others given may be properly refused.

*Appeal from Osage County Circuit Court.*

*John O'Day*, for Appellant, cited: *Cecil vs. Pacific R. R. Co.*, 47 Mo. 247; *Shearm. & Redf. Negl.* § 462; *G. W. R. R. vs. Northland*, 30 Ill. 451; *Morrison vs. N. Y. & N. H. R. R.* 32 Barb. 568; *Ellis vs. Pacific R. R. Co.*, 55 Mo. 278, and authorities there cited; *Woodfolk vs. Gate*, 25 Mo. 597; *Cocker vs. Cocker*, 56 Mo. 180.

*Lay & Belch*, for Respondent, cited: *Seaton vs. C., R. I. & P. R. R. Co.*, 55 Mo. 416; *Hudson vs. St. L., K. C. & N. R. R. Co.*, 53 Mo. 525.

NORTON, Judge, delivered the opinion of the court.

This was a suit brought before a justice of the peace in Benton Township, Osage County, under Wagn. Stat. § 43, 310, for the recovery of damages for killing a bull of plaintiff at a point on said road where it had not been fenced according to law.

The complaint is in all respects formal and complete, and sufficiently states a cause of action. Upon a trial in the circuit court plaintiff obtained a verdict and judgment for \$50.00, from which defendant has appealed, and seeks a verdict of the same for al-

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legal errors of the court in admitting evidence and in giving and refusing instructions.

It appeared from the evidence that the animal in question went upon the track at a point on said road where the fence was not more than three feet high, and that this was a place at which defendant was bound under the law to maintain a fence.

Plaintiff offered in evidence a certified copy of a deed of lease, executed by the Pacific Railroad Company to the defendant, which was admitted in evidence against the objection of defendant that the original was the best evidence and was not accounted for, and no notice was given to produce it.

It appears that the deed was offered for the purpose of showing that the defendant was a corporation operating the road.

The defendant was sued in this capacity, as is shown by the statement, and the appearance of defendant to the action is an admission of its corporate existence and dispenses with the necessity of establishing it by evidence. If, therefore, the objections taken to the certified copy were technically well founded, the admission of it to prove a fact not necessary to be proved affords no reason for interfering with the judgment. (*Seaton vs. Chicago, R. I. & P. R. R. Co.*, 55 Mo. 416.)

The instructions given for the defendant and those refused, which were asked by the defendant, are the only instructions preserved in the bill of exceptions. Those given for the plaintiff are not preserved, and the reason assigned for their not being copied in the bill of exceptions is, that they were either taken by the jury, or the lawyers, and not returned. We are asked to reverse the judgment on this ground, and it is claimed that in this respect the case is within the principle of the case of *Cocker vs. Cocker*, 56 Mo. 180. The case at bar is distinguishable from that, in this, that the same judge who gave the instructions complained of determined the motion for a new trial; while in the case cited the motion for the new trial, on the ground that the verdict was against the evidence and that the court admitted improper evidence, was determined by a judge who had not heard the evidence, and who succeeded the one who did try the case and had heard the evidence which was not preserved.



The judgment of the circuit court overruling the motion for a new trial was reversed on the ground that it was better to allow a new trial, when the court for any cause cannot consider the merits of an application for that purpose, than to refuse it; for by denying the motion, without giving the party the benefit of being heard or having his reasons considered, irreparable injury may be done. The reasons which operated in that case as well as the case in 25 Mo. do not apply in this. For it does not appear here that the instructions were not before the court at the time the motion was heard and disposed of, or that any effort had been made to supply their loss. It only appears from a statement made in the bill of exceptions that they were not copied because they had been taken away, either by the jury or lawyers, and not returned.

The reversal of the judgment for such a reason, in the absence of anything to show that all the proper efforts had been made to supply the omission of the mislaid record, would encourage neglect and invite interminable litigation.

The instructions given for the defendant, and which are incorporated in the bill of exceptions, put the case fairly before the jury. They were told in them that "unless they were satisfied from the evidence that the allegations in the plaintiff's complaint were true, they would find for defendant, and that it devolved on plaintiff to show by satisfactory evidence that the bull got on said railroad at a place where the same passes through, along or adjoining enclosed and cultivated fields, and where said railroad was not enclosed by a lawful fence of the height of five feet, and that it was immaterial as to where the bull was killed, and that in the absence of such evidence they would find for defendant."

These propositions seem to embrace the whole law of the case as applied to the evidence. We are not prepared, nor would we be authorized, to say that the instructions refused were wrongfully refused, inasmuch as they may have been refused because the jury were fully instructed on the same subject matter in the instructions given for plaintiff, and which are not before us.

Judgment affirmed, the other judges concurring.

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State ex rel. Missouri State Board, etc. v. Holladay.

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**STATE *ex rel.* MISSOURI STATE BOARD OF AGRICULTURE, Relator, vs. THOMAS HOLLADAY, STATE AUDITOR, Respondent.**

1. *State Entomologist—Act for annual payment to, of \$3,000, unconstitutional.*—The act of March 23rd, 1870, whereby \$3,000 was appropriated annually to the State Entomologist, in so far as it contemplated payment of the annuity for more than two years after the date of the act and without a biennial appropriation, became void on the adoption of the present constitution. (See §§ 20, 24, art. iv, and § 19, art. X.) These provisions are self-executing without ancillary legislation, and refer not merely to prospective appropriations, but to those existing at the adoption of the constitution.

The fact that schedule 6 of the constitution keeps the entomologist in office, does not affect his right to draw salary under the act.

*Application for Mandamus.*

*Geo. W. Taussig with H. M. Jones*, for Relator, cited: Sedgw. Const., 161, 164, 173 (2d. Ed).

*J. L. Smith*, for Respondent, cited: St. Joe. Board Pub. Sch. vs. Patten, 62 Mo. 450.

SHERWOOD, C. J., delivered the opinion of the court.

Argument has been heard touching this application for a *mandamus* against the State Auditor, who has refused to issue a warrant for the services of C. V. Riley, State Entomologist, during the current year commencing on the 23d ult. Reliance for the issuance of the writ is placed on the act of March 23d, 1870, whereby the sum of \$3,000 is "appropriated annually" for the services of the last mentioned officer. On the other hand it is urged that recent and radical changes in our organic law have virtually repealed those statutory provisions whereon the petitioner relies; and this is the only point presented which goes to the merits of the present application.

Let us examine the grounds on which the assertion, offered in resistance to the issuance of the writ, is supposed to rest.

Section 20 of art. 4 of the Constitution, provides that "the general assembly shall meet in regular session once only in every two years."

Section 43 of the same article prohibits "money to be drawn from the treasury except in pursuance of regular appropriations made by law."

From a consideration of these two sections, it seems quite obvious that no appropriations of money find recognition in the constitution except "regular appropriations," and that such cannot be made except at regular legislative sessions, occurring biennially. This view of the matter receives abundant confirmation in the prohibitions of section 19 of article X, that "no moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act, and every such law making a new appropriation or *continuing or reviving* an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object," etc.

The act of March, 1870, is clearly inconsistent with the provisions of the constitution above quoted, and in consequence thereof, and in conformity with what the schedule ordains, the provisions of that act ceased when the constitution was adopted. For although the sections of the constitution just cited, do not in express and direct terms inhibit the auditor from drawing his warrant in favor of a claimant who relies on an appropriation more than two years old, yet those sections, by necessary and inevitable implication, accomplish the same result; for it cannot, with any show of reason, be claimed that a warrant can be drawn without an appropriation; but as just seen, no appropriation possesses any validity, force, or even existence, after the lapse of two years.

These provisions of the organic law are self-executive, and consequently need no legislation in their aid. (St. Joe. Board Pub. Schools vs. Patton, 62 Mo. 444.)

Immediately upon their adoption they became operative and effective, not only *prospectively*, but as to all *existing* appropriations. Any other construction than this would only partially abolish the evils and eradicate the mischiefs these constitutional provisions were designed to remedy. Because heretofore, owing to the number and variety of special appropriations hidden in nu-

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merous and disconnected session acts, and extending during a long series of years, it was next to impossible, even after exhaustive care and research, to ascertain the precise financial *status* of the State. This shows very pointedly, as we think, the error of the idea which seeks to limit to future appropriations alone the operation of the constitutional provisions under discussion, the evident purpose of which was to show once every two years, by a general appropriation act *and at one connected view*, all sums for which the auditor during the next ensuing biennial period could be lawfully called upon to issue his warrant.

Whether, then, we consider the plain language of the fundamental law or, resorting to a very familiar rule of construction, reflect on "the old law, the mischief and the remedy," it seems plain, beyond question, that the auditor did but obey the constitutional mandate when refusing to issue his warrant. And if any doubt should still linger in the mind on this subject, that doubt will be quickly resolved in favor of the position we have assumed by examination of the debates in the convention which framed the constitution. When speaking of section 19, *supra*, Mr. Letcher observed: "In regard to the section, I desire to say that if I understand the object of it, *it is to keep the matter of appropriations close up together*. An appropriation made at one time, made we will say to-day, by law, and no warrant, for instance, issued for that appropriation until two years hence, we find that the State finances would be in such a condition that, unless we put some limit upon this thing, it will be almost impossible to know how the treasury does stand."

And commenting on the same section, Mr. Mudd said: "Now, the object of the committee was to restore to the general revenue the balances of the appropriations not applied at the end of every two years, so that each session of the General Assembly should make appropriations for the term during which they were elected, and not leave those appropriations open to be drawn upon at any time, which have been made by preceding General Assemblies. *It was to close up the books at least once every two years*, and then if any appropriation be made, let it be made by the General Assembly then in session."

The argument which has been advanced that as section six of the schedule continues Mr. Riley in office, that therefore he should be permitted to draw his pay does not at all affect the conclusion we have reached. If the legislature should fail to make appropriations for any other State officer, he might have a *moral* claim against the State for his services, but no legal method of redress. We shall deny the writ.

All the other judges concur.

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L. M. BIGBEE, Respondent, vs. JOHN COOMBS, Appellant.

1. *Bailment—Hire of horse—Receipt in full of demands, what items embraced in—Payment of price of hire—Waiver of damages.*—In action for the value of a horse hired by defendant and alleged to have been killed by his overdriving him, where it appeared that after the death of the horse, plaintiff presented to defendant an account containing among other items one for the hire of the horse, but no claim of damages for his loss, which account defendant paid, taking a receipt "in full of all demands;" held that such receipt would not bar a recovery. Evidence *aliunde* may be introduced showing that the damage for loss of the horse was not embraced in the settlement. And a charge by plaintiff for hire of the horse is no waiver of a claim for damages, nor is payment of such charge a settlement of that claim. A bailee may be chargeable both with the hire of the thing bailed, and its value if lost by his negligence.

*Appeal from Greene County Circuit Court.*

*Patterson & Barker*, for Appellant, cited: 2 Pars. Cont., Ed. 1866, 128-9.

*John O'Day*, for Respondent, cited: 1 Pars. Cont. (4 Ed.) 605, 606; Sto. Bailm. (5 Ed.) 399, 400.

HOUGH, Judge, delivered the opinion of the court.

This was an action to recover the value of a horse let by the plaintiff to the defendant and alleged to have been killed by being overdriven by the defendant.

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The case was tried by the court without the aid of a jury, and plaintiff recovered judgment for \$125.

There was evidence to support the finding of the court, both as to the value of the horse and the cause of its death.

The only error assigned here worthy, of notice, relates to the action of the court in reference to a certain receipt.

It appears from the record that after the killing of the horse in question, the plaintiff, with knowledge thereof, presented to the defendant for payment an account containing among other items, one for the hire of the horse killed, which account the defendant paid and took from the plaintiff a receipt for the amount thereof, expressed to be in full of all demands. The defendant requested the court to instruct the jury that this receipt was a bar to a recovery by the plaintiff, and the court refused so to instruct.

There was no error in this action of the court. The receipt was open to explanation (*Grumley vs. Webb*, 44 Mo. 444), and it is evident from the items of the account presented and paid that the subject matter of this suit was not embraced in the settlement made. There was no reference whatever in the account to the claim for damages. It might very properly have been left to the jury to determine what was included in the settlement, but it was certainly improper to declare as a matter of law that the receipt itself would preclude a recovery, regardless of the intention of the parties and the nature of the transaction. The fact that the plaintiff charged the defendant with the hire of the horse killed, was not a waiver of his claim for damages for the killing of the horse, nor was the payment of such hire, of itself, a settlement of the claim for damages.

A bailee may be chargeable both with the hire of the thing bailed and its value, if lost by his negligence. (*Story Bail*. § 417.) The judgment will be affirmed. All the other judges concur except Sherwood, C. J. absent.



## RANSOM MATLOCK, Respondent, vs. H. H. MEYERS, Appellant.

1. *Warranty*.—On a statement filed with a justice that defendant represented a mare to be sound when she was not sound, whereby plaintiff was damaged etc., held, that there was no charge of warranty, or fraud, or deceit, and that proof relating to such issues would be improper.
2. *Sale—Implied warranty*.—In the sale of a horse there is no implied warranty of soundness.
3. *Warranty—Representation will not amount to, unless*.—A representation of soundness or other quality is not necessarily a warranty. To have that effect it must be so intended and understood, and not be the expression of a mere matter of opinion.
4. *Warranty—What representation not*.—The representation that she is "a good mare" is not a warranty of the soundness of the animal.

*Appeal from Phelps County Circuit Court.*

*Seay & Parker*, for Appellant, cited: Pars. Contr. 577, 581 and note; 2 Stark. Ev. 902, 903; Smith's Am. Law, 638 and note; McFarland vs. Newman, 9 Watts. 55; Chit. Contr. 137; 30 Mo. 406; 2 East. 314; Moses vs. Mead, 1 Denio, 385; Emerson vs. Bingham, 10 Mass. 207; Sweet vs. Colgate, 20 Johns. 203; Foske vs. Caldwell, 18 Vt. 276.

*C. C. Bland*, for Respondent, cited: Barnard vs. Duncan, 38 Mo. 170; Cecil vs. Spurger, 32 Mo. 462; Wannell vs. Kem, 57 Mo. 478.

HENRY, Judge, delivered the opinion of the court.

This was a suit before a justice of the peace. The statement filed with the justice was as follows:

"The plaintiff states that on March 11th, 1873, defendant sold to plaintiff a mare for \$85, which the defendant then and there represented to be sound when she was not sound, and that she was unsound in her eyes, and he was thereby damaged in the sum of fifty dollars for which he asks judgment."

There was a trial in the justice's court which resulted in a verdict and judgment against defendant, from which he appealed to the circuit court of Phelps county, where plaintiff again obtained a judgment for ten dollars, from which defendant has duly appealed to this court.

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The testimony, on the part of plaintiff, was that defendant represented to plaintiff that the animal "was a good mare."

Plaintiff testified to this, and also that defendant did not warrant the mare to be sound, and that he did not ask defendant to warrant her; that some time after the purchase, he discovered that her eyes were diseased.

As to the unsoundness of the mare, after the purchase, plaintiff was corroborated by several witnesses. This was substantially the evidence on the part of plaintiff, and thereupon defendant asked the court to instruct the jury, that "the plaintiff had failed to show sufficient facts to entitle him to recover," which the court refused. Defendant then introduced witnesses whose testimony conduced to prove that the mare was sound while defendant owned her, except that once he had her cut for what is known as the "hooks." This was about six months before the sale to plaintiff, and plaintiff's witness, Gosser, who performed the operation, testified that he saw the mare about three weeks after the operation, and she seemed almost well; that he had cut a great many horses for the hooks, and they all got well but one.

This was the substance of the evidence introduced by defendant, and he again asked the court to instruct the jury, that plaintiff could not recover, and the court again refused the instruction.

It will be observed, that the statement of the cause of action, filed with the justice, neither alleges a warranty, nor fraud and deceit, on the part of defendant, nor does it appear from the evidence that defendant warranted the mare to be sound, or practiced any fraud upon plaintiff, nor would evidence of fraud and deceit have been admissible on the statement filed by plaintiff. On the contrary, the plaintiff testified that the representation made by defendant was that the mare was a *good mare*—not that she was *sound*, and that he did not warrant the mare, and that he did not ask defendant to warrant her—and there was no evidence tending to show that defendant, when he made the sale, knew that the mare was diseased. In the sale of a horse there is no implied warranty of soundness—and here there is no express warranty alleged in the statement. A representation of

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soundness or of any other quality in an article sold, is not necessarily a warranty. The evidence of the representation, where a warranty is alleged, is admissible, and in connection with other circumstances, may establish the warranty, but before a jury should find such representation to have been a warranty, they should be satisfied that it was "so intended and understood, and not to have been the expression of mere matter of opinion." (Foster vs. Estate of Calonele, 18 Vt. 180; McFarland vs. Newman, 9 Watts. 56; Pars. Contr., Vol. 1, 580; House vs. Fort, 4 Blackf. 296; Ender vs. Scott, 11 Ill. 35; Humphreys vs. Comline, 8 Blackf. 516.)

The first instruction given by the court for plaintiff is in conflict with the views herein expressed, and should have been refused for the additional reasons that there was no evidence upon which to predicate it. It was in substance that if defendant, in any manner, represented the mare to be sound when he sold her to plaintiff, and the mare was unsound in her eyes and it could not be detected by plaintiff on examination, the jury should find for plaintiff. Neither plaintiff nor any other witness testified to any representation by defendant in regard to the soundness of the mare. The representation proven was that she was a "good mare." She may have been a good mare, and yet in some particulars unsound. These are not incompatible qualities.

Judgment reversed and cause remanded, the other judges concurring, except Sherwood, C. J., absent.

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HENRY S. BEERY, Defendant in Error, vs. THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Plaintiff in Error.

1. *United States Courts, removal of causes to—Power of State Courts after.*—Where proper application is made by defendant for the removal of a cause from the State to the United States Court, the former can proceed no further with the cause, and a non-suit cannot be taken therein by plaintiff.

*Error to Clinton County Circuit Court.*

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*Shanklin, Low & McDougal*, for Plaintiff in Error, cited: *Ferry vs. Imperial Fire Ins. Co.*, per Dillon, J., 2 Cent. L. J., 459; *R. R. Co. vs. Whitton*, 13 Wal. 270; *Herryford vs. Ins. Co.*, 42 Mo. 151-3; *Hough vs. West. Transp. Co.*, 1 Biss. 425; *Gordon vs. Longest*, 16 Pet. 97; *Kanouse vs. Martin*, 15 How. 198; *Roberts vs. Nelson*, 8 Blatch. 74; *Fashnacht vs. Frank*, Sup. Ct. U. S., 2 Cent. L. J., 290; *Osgood vs. C. D. & V. R. E.*, 2 Cent. L. J., 283; *First Nat. Bank vs. Bridge Co.*, 2 Cent. L. J., 616; "The Two Orphans," 2 Cent. L. J., 738; *Browning vs. Chrisman*, 30 Mo. 353; *Worthington vs. White*, 42 Mo. 462; *Keithley vs. May*, 29 Mo. 220.

No brief filed for Defendant in Error.

SHERWOOD, C. J., delivered the opinion of the court.

Plaintiff sued defendant for damages in the sum of \$1,500 alleged as resulting from the construction and operation of defendant's road on the street in front of plaintiff's premises in the town of Cameron. Suit was brought in July, 1875. At the ensuing August Term, defendant applied for the removal of the cause to the Federal Court.

The application and bond were in the usual form and the bond approved. After this occurred, plaintiff, as the bill of exceptions recites, "with the avowed purpose of reducing his claim herein below the jurisdiction of a Circuit Court of the United States \* \* \* for the purpose of preventing said defendant from removing said cause \* \* \* and with the intent to renew said suit by filing a new petition in this court, for the said cause of action, with the claim of damages reduced below \$500, by leave of the court dismissed said suit." Thereupon the application of defendant was denied.

We regard such denial as erroneous.

In *Stanley vs. The Chicago & Rock Island R. R. Co.* (62 Mo., 508,) it was held, following as well a former decision of this court (*Herryford vs. The Aetna Insurance Co.*, 42 Mo. 148) as the rulings of the Supreme Court of the United States, (*Kanouse vs. Martin*, 15 How. 198; *Gordon vs. Longest*, 16 Pet. 97) that

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upon the proper application being made conformably to congressional requisition, the State Court could proceed no further with the cause, and any attempt in that direction was *coram non jndice*.

In that case the plaintiffs sought to prevent the removal by amendment whereby he reduced the amount of his claim below \$500, but it was held to make no difference, seeing that the jurisdiction of the Federal Court had attached. (Kanouse vs. Martin; *supra*.) I am unable to distinguish the case at bar from our last adjudication respecting applications of the nature under consideration, since if the jurisdiction of the Federal Court had attached to the subject matter of the action, the State Court was powerless to proceed in any manner, unless the novel theory of a divided jurisdiction should prevail.

The distinction between taking a non-suit and so amending a petition as to reduce the claim, is one in *degree* rather than in *kind*, because the latter method of procedure is in reality a non-suit *pro tanto*, and the State Court, by allowing either course to be taken, is acting in contravention of the legislative mandate. It may be, indeed, urged, that on reaching the Federal Court the plaintiff may *there* dismiss his suit, and that it is but an idle ceremony to compel him to do this in the United States Court instead of the court wherein the cause originates; but this is a matter wherein we have no concern, for it is a question not of convenience or expediency, but a simple one *of power* in the State court to proceed further when expressly prohibited from so doing. The application for removal in the present instance was framed under section 639, U. S. R. S.; but so far as concerns the case before us, and the point being discussed, it was good, under the act of March 3d, 1875. As the third section of that act is similar in its provisions to sec. 639, *supra*, in the duty it imposes on the State court to accept the petition and bond, and having done so, to proceed no further in the suit. As before seen, the approval of the court had been given, and consequently no necessity exists for examination of the point elsewhere asserted, that the mere filing of the petition and bond, *ipso facto* removes the cause. ("The Two Orphans" 2 Cent. L. J., 730 & cas. cit.)

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For the errors committed in permitting the dismissal, and in refusing a removal of the cause, the judgment must be reversed and the cause remanded. All the judges concur.

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JOHN D. BROWN, *et al.*, Defendants in Error, *vs.* MISSOURI, KANSAS & TEXAS RAILWAY, Plaintiff in Error.

1. *Railroads—Damages—Stock pass—Ejection of wife.*—In an action of damages against a railroad company, by A. and his wife, for ejecting the latter from a train, it appeared that A. made a special contract with defendant for the transportation of stock, which contract provided that none but the owner or persons in charge of the stock should be entitled to a return pass. A. applied to the agent of the road for a pass for his wife, stating that she was the owner of a part of the stock; whereas, she neither owned nor had charge of any of the stock. On this statement the agent issued the pass, saying at the time that he had no authority to issue one to a lady, and doubted if the conductor would recognize it. The pass was given "on account of stock account surrendered," and bore endorsed on the back an acceptance by the wife, subject to its conditions and with the expressed stipulation, that the company should not be liable for any injury to her person or property. The wife, being in company with her husband, offered her pass, which the conductor refused to recognize, and, on her declining to pay the required fare, handed her, without any violence or incivility, from the train; whereupon the fare was paid and plaintiffs re-entered the train and proceeded upon their journey. *Held*, that the procurement of the pass from the agent, by misrepresentations, was a fraud upon the company which vitiated the contract; that it was obviously the intention of A. to pay the fare, if necessary to enable his wife to ride, and in view of this fact and the conduct of the conductor, plaintiff had no ground for punitive damages, such as might be given in case of a real expulsion.

*Error to Henry County Circuit Court.*

*Jno. Montgomery, Jr.*, for Plaintiff in Error, cited: *Blower vs. G. W. R. R. Co.* [1872], L. R. 7, C. P. 655; *Kendall vs. L. & G. W. R. R. Co.*, Law Tim., 5th June, 1872; *Louisville, Cin. & Lex. R. R. vs. Hedger*, 13 Am. Law Reg., p. 145, March, 1872; *Sto. Agen.* §§ 56, 75, 228; *Sanford vs. Handy*, 23 Wend. 268, and cases cited; *Towle vs. Leavitt*, 23 N. H. (3 Frost), 360; *Sherman vs. C. & N. W. R. R.*, 40 Iowa, 46; *Bragg vs. Bram-*



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berger, 23 Ind. 200; Gillett vs. Missouri Valley R. R., 55 Mo. 322; Kennedy vs. North Mo. R. R. Co., 36 Mo. 365; Buckley vs. Knapp, 48 Mo. 152; Tarhill vs. C. P. R. R. Co., 34 Cal. 623; Illinois Cent. R. R. Co. vs. Johnson, 67 Ill. 36; Chicago & Alton R. R. Co. vs. Flagg, 43 Ill. 364; Illinois C. R. R. Co. vs. Johnson, 67 Ill. 315; T. H., A. & St. L. R. R. Co. vs. Vanatta, 21 Ill. 188; Ackley vs. Staehlin, 56 Mo. 558; Dedo vs. White, adm'r, 50 Mo. 241.

*Boone & Johnson*, for Defendants in Error, cited: New York Central Railroad Co. vs. Lockwood, 17 Wall. 357 and authorities cited.

NAPTON, Judge, delivered the opinion of the court.

This is an action brought by Brown and wife to recover damages from the railroad company, the defendant, for ejection of his wife from a passenger car, on a trip from Hannibal to Montrose, in Henry county, where the plaintiffs lived.

The facts in the case appear to be undisputed and may be substantially stated as follows: The plaintiff, Brown, had a contract with the defendant to transport four car loads of stock from Montrose to Hannibal. The contract contained a provision authorizing the owner of the stock and one or two employees, according to circumstances, to ride upon the train in which the stock was transported, and the agents of the company were authorized to issue passes, both to the owner and the employees accompanying the stock to their destination and for their return. By the special contract made in this case, it was provided, that no person except the owner or parties in charge should be entitled to a return pass, the intent being declared to be to enable "*said owner or his men in charge, as expressed in the contract, and no other person, to return on such pass.*"

Upon the contract the following rules were indorsed: "For the purpose of taking care of the stock, the owner or men in charge will be passed on the train with it, and all persons thus passed are at their own risk of any personal injury from any cause whatever, and must sign release to that effect on contract."

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"The agent, at the station where the stock is loaded, will enter on the back of the contract the name or names of persons who are thus to be passed free with the stock, which is authority for the conductor to pass them." "Agents will refuse to enter any name on contract but those of owner or employees in charge, and who accompany the stock, without regard to passes required by number of cars."

The plaintiff applied to the agent of the defendant at Montrose for tickets for himself and "L. Brown." After some conversation between the parties, the agent ascertained that L. Brown was the wife of the owner, and expressed his doubts as to whether he had any authority to issue such a pass, and also some doubt as to whether the conductor would allow Mrs. Brown to travel on such a pass, if issued.

However, upon Mr. Brown asserting that his wife was the owner of the stock on two of the cars, the passes were issued, the agent stating at the time that he had never issued a stock pass to a lady, and he doubted if the conductor would recognize it. It subsequently appeared upon the examination of Mr. Brown upon the trial, that he was the sole owner of all the stock on the cars, and that his wife, with a young daughter, was making a visit to some relation in Illinois, near Hannibal. At Hannibal, Mr. Brown, on his return from Chicago, the ultimate destination of his stock, applied to the agent at Hannibal for passes, one for himself and one for "L. Brown," presenting at the same time a stock contract to the agent. The agent asked him where his other *man*, L. Brown, was. To which Mr. Brown replied, "the other man is my wife." The pass was finally given and was as follows:

"Missouri, Kansas & Texas Railway return stock pass good for one trip and one person only. Conductor will take up this pass.

"Hannibal, Feb'y 11th, 1874.

"Pass L. Brown from Hannibal to Montrose on account of stock contract surrendered, dated Jan'y 17th, 1874, for four cars; must be countersigned by agent at Hannibal.

"F. W. BOWEN, Gen. Sup't.

"Countersigned, L. S. ALLEN, 29.

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"Not transferable and void if presented after one month from date of contract, as herein expressed."

On the back of the above ticket was the following agreement :  
1874.

"In consideration of receiving this free 27 return pass, I accept it subject to the conditions expressed thereon, and hereby expressly agree that said company issuing it shall not be liable for any injury to my person or property.

"A."

L. BROWN."

The conductor on the train from Hannibal to Paris refused to recognize the validity of the pass, and requested Mrs. Brown to leave the cars unless her fare was paid. Mr. Brown advised her to remain in the car until she was put off. After considerable discussion between the plaintiff and the conductor, Mrs. Brown was put off the cars in the vicinity of Paris about 10 o'clock in the morning, but immediately re-entered, her husband having paid her fare. No incivility was offered her, or any want of courtesy displayed by the conductor, either in handing her off the cars or placing her back, as she states herself. It was conceded that Mrs. Brown really exercised no care over the stock, but was making a trip to some relatives in Illinois. Upon the trial the court instructed the jury as follows for the plaintiffs :

1. "It is admitted by the pleadings that plaintiff, John D. Brown, did make a written contract with defendant for the transportation, for a valuable consideration, of four car loads of stock from Montrose to Hannibal ; that by virtue of said contract said John D. Brown was entitled to two return tickets or passes from Hannibal to Montrose upon defendant's passenger cars ; that on the tenth day of February, 1874, said John D. Brown presented to the agent of the defendant, at Hannibal, the copy of said contract in his possession, and did receive from defendant's agent, at Hannibal, two return tickets or passes, *authorizing* the parties therein named to travel on the passenger cars of said defendant from Hannibal to Montrose ; and if the jury find from the evidence that at the request of the plaintiff, John D. Brown, one of said return tickets or passes was made out in the name of Louisa Brown, one of the plaintiffs, and was signed and ac-

cepted by her, who was then, and is now, the wife of the other plaintiff, said John D. Brown, and the same was delivered to said Louisa Brown for her use; that on said day she entered into and took her seat in a passenger car of defendant at Hannibal, then forming part of the train of cars about starting for Montrose and other points southward; that the train did start and after traveling some distance in the direction of Montrose, the conductor of said train and agent of defendant refused to recognize said return ticket or pass of plaintiff, Louisa Brown, and demanded the usual fare; that said plaintiff, Louisa, declined and refused to pay it; that after her refusal to pay, and also after the refusal of her husband, John D. Brown, who was present, to pay for her, the said conductor, being agent of the defendant, required said plaintiff to leave the car and train, and said conductor did cause the said train to stop and put the said Louisa Brown off the car and train, and these facts being admitted or found by the jury, from the evidence as aforesaid, the finding must be for plaintiffs; and in determining the amount of damages, the jury will take into consideration all the facts and circumstances given in evidence, and assess the damages accordingly."

2. "In assessing damages the jury will take into consideration the time, place and manner of ejecting plaintiff, Louisa Brown, from the car, and if the jury believe, from the evidence, that she was put off the car at a point on the road where there was no station, and not at or near any house, or that it was in the woods out of sight of any house, or that the roads were in bad condition for a female to travel on foot; all these may be taken into consideration in assessing the damages."

3. "Corporations can only act through agents and are liable in damages for all acts of their authorized agents, when performed in the line of their duty."

4. "The court instructs the jury that the return ticket or pass, read in evidence and indorsed by L. Brown, was a legal pass and authorized her to travel on defendant's train from Hannibal to Montrose."

Eight instructions were asked by the defendant, based substantially upon the assumption that this pass to Mrs. Brown, as

L. Brown, was prohibited by the rules of the company, and by the special contract in the case, and that the pass was void, and that the conductor had a right to remove Mrs. Brown from the train, provided it was done at or near a station or dwelling house, and unaccompanied by any force or incivility to the lady.

These instructions were refused. The jury returned a verdict for fifteen hundred dollars damages, of which, at the suggestion of the court, seven hundred and fifty dollars were remitted, and the court entered judgment on the verdict.

The promptness with which juries usually inflict punishment for the incivilities or brutalities which occasionally characterize railroad officials, seems hardly sufficient to account for the verdict in this case. The bare statement of the facts would appear sufficient to show the want of all merit in the plaintiff's claim. It is based on a successful attempt to procure from the agent of the railroad company passes, to which, as the applicant and agent both knew, the applicant was not entitled. The printed contract and regulations attached to it were clear, that, under these special stock contracts, females were not entitled to passes. When, therefore, Brown represented his wife to be part owner with a view to furnish the agent with a plausible excuse for his breach of authority, he admitted that upon his own construction and knowledge of the transportation contract he could not pass his wife as an employee. The agent had no authority to issue passes to a lady on a stock contract, and Mrs. Brown and her child could not and did not pretend to exercise any supervision over the stock at the commencement or during the continuance of the trip; and the plaintiff admitted that his statement in regard to her interest in the stock was false, and she had no other interest than such as she had in all his personal property.

There is no difficulty in distinguishing this case from cases where an agent exceeds his authority, which is a general one, and its limitations are unknown to the party dealing with him. The contract itself and the regulations printed on it, and the form of the pass issued, could not be misunderstood. A party dealing with the agent in this case, was a party to the fraud committed on the principal.

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In regard to the place where the conductor handed the lady off the train, the inconvenience might undoubtedly justify damages in a case where there was a real expulsion; but the train stopped at Paris, where the conductor proposed that Mrs. Brown should get off, and where she only refused to get off at the suggestion of her husband, who was bent on getting up a case for damages, and therefore insisted she should stay on the cars until she was put off. The testimony of Mrs. Brown acquits the conductor of any incivility whatever, and states, too, in her own language, that he acted "very genteelly." And as it was obviously Mr. Brown's intention to pay the fare as soon as he was satisfied that his wife could not proceed on the train without doing so, and he could get the conductor to put her off, we are unable to perceive any grounds upon which punitive damages were inflicted.

According to the statement of the conductor, who seemed reluctant to remove Mrs. Brown from the train, it was suggested that if she would pay the fare, the conductor would telegraph his superintendent, and if it was ascertained that he misunderstood his duties, the money would be returned. This proposal was declined under the impression, no doubt, that this stock pass to Mrs. Brown, however procured, and under whatever circumstances issued, would, if violated, furnish a cause of action against the company.

The judgment is reversed and the cause remanded. All the judges concur, except Sherwood, C. J., who is absent.

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**JULIUS MEYER, Defendant in Error, vs. ATLANTIC & PACIFIC RAILROAD COMPANY, Plaintiff in Error.**

1. *Railroads—Damages—Interest not allowable, when—Failure to ring bell, averments of petition as to.*—1st. In suit against a railroad for damages for the killing of stock in consequence of the negligence of the company, plaintiff's interest on the amount of damages from the date of the accident is improperly allowed. 2d. In such suit defendant cannot be held for negligence in failing to ring its bell as required by statute, unless such negligence is in some manner made to appear in the petition, either by stating the facts which under the statute create the liability, or by some appropriate reference to the statute itself.



*Error to Gasconade County Circuit Court.*

*J. N. Litton*, for Plaintiff in Error, cited: *Atkinson vs. A. & P. R. R. Co.*, 63 Mo. 367; *Marshal vs. Schricker*, 63 Mo. 308; *Kenney vs. Han. & St. Joe. R. R.* 63 Mo. 99; *Walther vs. Warner*, 26 Mo. 146; *Kennayde vs. Pacific Railroad*, 45 Mo. 255.

*Lay & Belch*, for Defendant in Error, cited: *Wagn. Stat.* 310, § 38; 808, § 3.

NORTON, Judge, delivered the opinion of the court.

This was an action, instituted in the circuit court of Osage county, to recover damages for a heifer charged to have been killed through the negligence and carelessness of defendant in operating its road. The trial resulted in a verdict and judgment for plaintiff for twenty-nine dollars, to reverse which defendant prosecutes his writ of error. The error complained of is that the court gave improper, and refused to give proper, instructions.

The court gave the following instructions for plaintiff:

"If the jury believe from the evidence that the cow was killed at a crossing of a traveled public road, and that the whistle was not sounded at least eighty rods from such road, and sounded at intervals until such train crossed said road or rang a bell at least eighty rods from such road and rang it at intervals till it crossed such road; and they further believe that the injury to plaintiff's cow resulted from the neglect to sound the whistle or ring the bell they will find for plaintiff."

In the second instruction the jury were told that if they found for plaintiff they would assess his damages at what, from the evidence, they may believe he sustained together with interest from the time of such damage at the rate of six per cent.

The precise question as to the allowance of interest in cases like this has been expressly decided in the cases of *Kenney vs. Han. & St. Joe. R. R. Co.*, 63 Mo. 99; *Atkinson vs. A. & P. R. R. Co.*, 63 Mo. 367, and necessarily leads to a reversal of the judgment in this case; and as it will be retried, it may be well to observe that this action is founded upon the common law, and

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not the statutory liability of defendant. It is only by statutory enactment that defendant is required to sound the whistle or ring a bell eighty rods distant from a point where the railroad crosses a public road, and if defendant was intended to be made liable on account of this neglect, such intention should in some manner have been expressed in the petition, either by statement of the facts, which under the statute created the liability or by some appropriate reference to the statute itself. (Walther vs. Warner, 26 Mo. 143; Hausberger vs. Pacific R. R. Co., 43 Mo. 196; Kennayde vs. P. R. R. Co., 45 Mo. 255.)

For the error committed in giving instructions the judgment is reversed and cause remanded, the other judges concurring.

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ELIZABETH POWELL, Defendant in Error, vs. THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Plaintiff in Error.

1. Beery vs. Chicago, Rock Island & Pacific R. R. Co., *ante* p. 533, affirmed.

*Error to Clinton County Circuit Court.*

*Shanklin, Low & McDougal*, for Plaintiff in Error.

No brief filed for Defendant in Error.

SHERWOOD, C. J., delivered the opinion of the court.

After the approval of the bond and entry of an order removing the cause to the Federal Court, it was clearly out of the power of the court, making the order, to set the same aside, and allow a dismissal of the suit. Our views on this subject are more fully expressed in Beery vs. the same defendant, *ante* p. 533.

Judgment reversed and cause remanded. All the judges concur.

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Miller v. Hardin, et al.

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**EZRA MILLER, Respondent, vs. SUE E. P. HARDIN, et al., Appellants.**

1. *Ejectment—Proof required where parties look to common source of title.*—In ejectment, where plaintiff and defendant claim from a common source of title, it is sufficient for plaintiff, in the first instance, to deduce his title therefrom, without going further. To that extent, the rule, that he must recover on the strength of his own title, is departed from.
2. *Practice, Supreme Court—Assessment of damages—Verdict—Judgment—Remittitur.*—Where judgment is rendered for damages not assessed in the verdict, the assessment will not require a reversal if the amount thereof is remitted by respondent, but *semble*, that in case of affirmance, respondent should pay the costs of the appeal.

*Appeal from Jasper County Court of Common Pleas.*

*Walser & Cunningham, with H. B. Johnson, for Appellants.*

*David Wagner, with W. H. Phelps, for Respondent, cited: Bucher vs. Rogers, 60 Mo. 138; Fellows vs. Wise, 49 Mo. 350; Brown vs. Brown, 45 Mo. 412; 2 Greenl. Ev., § 305.*

NORTON, Judge, delivered the opinion of the court.

This was a suit in ejectment, to recover a lot in Carthage, Jasper county. The petition is in usual form, and the answer contains a general denial. On the trial, plaintiff obtained judgment, from which defendant has appealed. The evidence tends to show that one S. N. Hostetter was, on the 7th day of February, 1873, in possession of the lot in controversy, claiming it as his own, and that defendant was in possession of the same on the 16th day of September, 1873.

Plaintiff offered in evidence the following deeds:

A mortgage deed from S. N. Hostetter, dated February 7th, 1873, to Meyers & Mohr, to secure the payment of a note for \$620.44. This deed contained a power of sale, and was filed for record in the recorder's office of Jasper county on the day of its execution;

Also, a deed from said Meyers & Mohr, to one Griswold, dated August, 30th, 1873, and a quit-claim deed of the

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latter date to plaintiff, Miller. The defendant objected to the introduction of all the deeds, upon the ground that no title had been shown to be in Hostetter, which objection was overruled. The plaintiff offered evidence tending to prove that in the summer of 1873 he went into the possession of the lot under a contract of purchase from S. N. Hostetter, who had executed the mortgage above referred to. The defendant, who was the only witness on the part of the defense, testified that he contracted with Hostetter for the property in July, who furnished him with an abstract of title, which, upon examination, covered property which he already owned; that he then rescinded the contract, and went into possession on his own title.

All the questions presented in the case arise upon the action of the court in giving the following instruction:

"The court instructs the jury that if they believe from the evidence that S. N. Hostetter was in possession of the premises in controversy, claiming them as his own on the 7th day of February, 1873, and that Hostetter executed to Meyers & Mohr the mortgage offered and read in evidence, and that Meyers & Mohr sold said property under said mortgage, and that S. B. Griswold purchased the same, and that Griswold conveyed the same to plaintiff, Ezra Miller, and that defendant entered into possession of the same under said Hostetter, subsequent to said mortgage, under a contract of purchase or otherwise, they will find for plaintiff."

It is well established that in ejectment, where plaintiff and defendant claim through a common source of title, that it is sufficient for the plaintiff to deduce his title from him who is the common source of title. (Brown vs. Brown, 45 Mo. 412; 2 Greenl. Ev., § 307; Adams Eject. 248; 1 Wend. 418; 7 Cow. 637.) It is sufficient for plaintiff to show prior possession as owner, either in himself or his grantor, and if it shall appear that the defendant holds under the same grantor, it is unnecessary to go further; the title of the common grantor is acknowledged, and so far the rule, that the plaintiff must recover on the strength of his own title, is departed from.

As against some unknown person, the title of both may be worthless, the common grantor not being the true owner, but, as between the parties, we have only to inquire which one acquired the title of the grantor, whatever that might have been. When this is shown by plaintiff he establishes a *prima facie* right, and unless the defendant can trace his title or right to the true owner—if such common grantor is not the true owner—or can show a better title to the interest of such grantor, the plaintiff must prevail. (Fellows vs. Wise, 49 Mo. 350.)

Applying these principles to the case at bar, the action of the trial court, in overruling the objection of defendant to the admission of the deeds offered in evidence, and in giving the instruction complained of, was fully justified.

It is also said that inasmuch as the jury, in their verdict, assessed no damages to plaintiff, and the court in rendering the judgment thereon, entered judgment for \$105 damages, it should, for that reason, be reversed. This objection is disposed of by the fact that plaintiff, in this court, has entered a remittitur of the said sum of \$105, which obviates the necessity for a reversal of judgment, which is in all respects affirmed, except as to said sum of \$105; plaintiff and appellee being required to pay all costs of the appeal, which are by this court adjudged against him.

Judges Napton and Henry concur, Judge Hough also concurs in the opinion, but not in the form of the judgment to be entered, Sherwood, C. J., absent.



JANE BROWN Respondent, vs. JOHN WOODY, ADM'R, ETC., Appellant.

1. *Judgment—Jurisdiction, want of, how shown.*—Jurisdiction must be shown by the whole record, and where it appears from it that the court had no jurisdiction, either over the person or subject matter, the judgment rendered is void. But from the simple judgment entry the conclusion cannot be drawn that the court had no jurisdiction.
2. *Jurisdiction over person and subject matter.*—Jurisdiction over the subject matter cannot be conferred by consent, but jurisdiction over the person may.

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Brown v. Woody, Adm'r.

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3. *Dower—Suit to enforce, where brought.*—Suit to enforce claim for dower can be brought only in the county where the land is situated.
4. *Judgment against estate of deceased person.*—A judgment cannot be enforced by execution against the estate of a deceased person, but must be classified, like other demands, against the estate.

*Appeal from Christian County Circuit Court.*

*James R. Vaughn*, for Appellant, cited: *Dodson*, Adm'r, vs. *Scroggs*, Adm'r, 47 Mo. 285; *Cones* vs. *Ward*, Adm'r, Id. 289; *State ex rel. Renick* vs. *St. Louis County Court*, 38 Mo. 402; *Gould* vs. *Hayes*, 19 Ala. 450; *Comm. vs. Hudson*, 11 Gray, 64, 65.

*C. W. Thrasher*, with *H. C. Young*, for Respondent, cited: *Hembree* vs. *Campbell*, 8 Mo. 572; *Dodson* vs. *Scroggs*, 47 Mo. 285; *Local Acts*, Gen. Assembly 1855, p. 58, § 4; *Swearingen* vs. *Wood*, Adm'r, 7 Mo. 421; *Carson* vs. *Walker*, 16 Mo. 68; *Miller* vs. *Doan*, 19 Mo. 650; *Wernecke* vs. *Wood*, Adm'r, 58 Mo. 357; *Howard* vs. *Thornton*, 50 Mo. 291; *Phillipson* vs. *Bates*, 2 Mo. 116.

NORTON, Judge, delivered the opinion of the court.

The plaintiff recovered judgment in the probate and common pleas court of Greene county, against the defendant, as administrator of A. Woody, deceased, which judgment was ordered by said court to be certified to the probate court of Christian county. On the 29th of October, 1873, plaintiff having given the requisite notice of her intention so to do, presented to the probate court of Christian county a certified transcript of said judgment for classification against the estate of A. Woody, deceased. The defendant appeared, and the said court, after hearing the cause, ordered said judgment to be placed in the 5th class of claims against the estate of said deceased. From this judgment defendant appealed to the circuit court of Christian county, which court affirmed the judgment of the probate court, placing said judgment in the 5th class of demands against the estate of the deceased. From this judgment defendant, having made an ineffectual motion for a new trial, appealed to this court.



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Brown v. Woody, Adm'r.

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On the trial of the cause plaintiff offered in evidence the following judgment, rendered by the probate and common pleas court of Greene county: Jane Brown, plaintiff, vs. J. M. Woody, Adm'r of Abraham Woody, deceased. Now, at this day comes on again to be heard this cause as to the damages claimed by plaintiff, for use, and occupation, and rents and profits of lands described in plaintiff's petition as the homestead of John D. Brown, deceased, the dower having been heretofore assigned by the order and judgment of this court on the agreement of parties in interest, and said cause continued as to the damages claimed by said Jane Brown, and the said parties being present by their attorneys, and neither party requiring a jury for the trial of said cause, but submitting the same to the court for the purpose of finding the facts in said cause; whereupon, after hearing the evidence in the cause, the court doth find that the said Jane Brown is the relict and widow of the said John D. Brown, deceased, and that the messuages described in the petition were the homestead of said John D. Brown, deceased, in possession; that the said John D. Brown, deceased, on or about the 1st day of November, 1864, and the said Abraham Woody, deceased, in his life time, and that said John H. Woody, administrator of said A. Woody, deceased, occupied the said messuages for the years 1865 and 1866, during the time for which the said Jane Brown was entitled to the possession and occupancy of the same, as such widow, and that the rents and profits of the same were worth three hundred dollars a year for each of said years 1865 and 1866. It is, therefore, considered and adjudged by the court that said plaintiff have and recover of and from the said John H. Woody, as such administrator, the sum of six hundred dollars for damages, and that she have her damages and costs and charges, and that the same be certified to the probate court of Christian county, Missouri.

This judgment, properly certified, was the only evidence offered in the case, and to its introduction defendant objected, urging in support of his objection, that the judgment was void, because the probate and common pleas court of Greene county had no jurisdiction either over Woody, as administrator, or the

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Brown v. Woody, Adm'r.

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subject matter of the suit, and because the said judgment having been rendered for damages for non-assignment of dower of lands in Greene county, belonging to the estate of A. Woody, deceased, the probate court of Christian county had no power or jurisdiction to award execution against the lands.

It may be inferred from the judgment, that the proceeding in which it was rendered was instituted for assignment of dower to plaintiff in lands in Greene county. When it was commenced does not appear. Whether it was begun in the life time of A. Woody or after his death, we are left to conjecture. How long it had been pending cannot be learned from the judgment. When Woody died, or how or when his administrator was made a party, cannot be ascertained from the record before us. It does, however, appear that A. Woody, in his life time, and his administrator, occupied the lands for the years 1865 and 1866; that during that time Jane Brown, the plaintiff, was entitled to the occupancy of the same, and that the rents and profits were worth \$300 per year.

We are asked, from the meagerness of the facts disclosed in the judgment, to declare that the court rendering it had no jurisdiction. Jurisdiction must be shown by the whole record, and when it appears from it that the court had no jurisdiction either over the person or subject matter, the judgment rendered in such case is void. From the simple entry, however, of a judgment, the conclusion cannot be drawn that the court rendering it had no jurisdiction.

Jurisdiction over the subject matter of an action cannot be conferred on a court by consent. The law alone, and not consent of parties, must determine what matters each court may determine. Jurisdiction over the person may be waived. If, therefore, the judgment read in evidence shows that the court had jurisdiction over the subject matter of the suit to which it related, it was properly admitted in evidence, as the appearance of defendant to the merits of the action waived the question of jurisdiction over the person. (*Hauler vs. Campbell*, 8 Mo. 572; *Howard vs. Thornton*, 50 Mo. 292; *Dodson vs. Scroggs*, 47 Mo. 285.)

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Under an act of the legislature (Local Laws 1855, p. 57, § 4), creating the probate and common pleas court of Greene county, among other things, it is provided that the court created by it shall "have exclusive original jurisdiction to hear and determine all disputes and other proceedings instituted against executors, or administrators, upon any demand against the estate of the testator or intestate, and proceedings for the assignment of dower in real and personal estate, in such manner as is now provided by law."

If the proceeding in which this judgment was rendered was a proceeding for the assignment of dower (and that such was the character of it, we think, is manifest from the statements contained in the judgment), then the jurisdiction of the probate and common pleas court of Greene county, over the subject matter of the suit, is unquestionable, for jurisdiction in such cases is expressly given, as above shown, in the law creating it. If the lands in which dower was claimed were located in Greene county (and this is conceded in defendant's objection), the suit to enforce the claim, and have dower assigned, could only be brought in that county.

It is said, that as the law provides for the issuance of an execution against the lands in which dower is claimed for damages, assessed to the party entitled to dower, that the judgment in plaintiff's favor should not have been claimed as a demand against this estate, but that the only manner of enforcing the judgment was by a special execution.

It is needless to cite authorities to show that an execution cannot issue against the estate of deceased persons. No such proceeding has been allowed in this State since 1827. Judgments against such persons, or their representatives, have to be classed as other demands, under our statute and repeated decisions of this court. (*Wernecke vs. Wood*, Adm'r, 58 Mo. 352; *Swearingen vs. Adm'r of Elemis*, 7 Mo. 421; *Cowan vs. Walker*, 16 Mo. 68; *Mitten vs. Doan*, 18 Mo. 650.)

Perceiving no error in the action of the trial court, the judgment is affirmed with the concurrence of the other judges, except Sherwood, C. J., absent.

## MARY WHITE, Respondent, vs. JAMES G. MAXCY, Appellant.

1. *Damages—Action by widow under § 3 of the Damage Act for killing of husband—Petition—Reference to statute.*—Section three of the Damage Act (Wagn. Stat. 520) merely causes a right of action to survive where the deceased, had he lived, might have had his action for injuries at common law. And in suit by the widow, for the death of her husband, where the petition states facts which bring the case within the provisions of that act, no reference to the act is necessary.
2. *Damages—Self defense, right of, when cannot be invoked.*—The right of self defense, which justifies homicide, does not imply the right of attack. And the plea cannot avail in any case where the difficulty was induced by the act of the accused, in order to afford him an opportunity to wreak his malice.
3. *Evidence—Falsus in uno—Instruction, etc.*—A jury may disregard the testimony of any witness whom they believe to have wilfully sworn falsely concerning any material fact in issue. But an instruction to that effect should not be given except where some witness has given false testimony; and on that point the trial court is best qualified to pass.
4. *Evidence of marriage, what sufficient.*—The testimony of a widow that the deceased was her husband, and that they had lived together seventeen years, was held amply sufficient to establish the fact of their marriage.
5. *Civil action for homicide—Danger of bodily harm—Opinion of witness.*—In an action of damages for homicide, the question asked of defendant, whether he apprehended that deceased would inflict on him any great bodily harm, was held properly excluded. His opinion on that subject was of no importance and was not legitimate evidence. (Wagn. Stat. 446, § 4.)

*Appeal from Miller County Circuit Court.*

*Lay & Belch*, for Appellant, cited: Wagn. Stat. 1020, § 41; Walther vs. Warner, 26 Mo. 146, 147; 1 Chit. Pl. p. 405; 2 Chit. Pl. pp. 494, 495; 1 Chit. Pl. pp. 387, 388; 16 Mass. 22; Kennayde vs. Pacific R. R., 45 Mo. 255; 1 Hempst. 238; Steel vs. Steel, 1 Nev. 27; Mitchell vs. Chaps, 12 Cush. 278; 13 Pick. 94.

*Ewing & Smith, with Rollins*, for Respondent, cited: Wagn. Stat. 520, § 3; Kennayde vs. P. R. R., 45 Mo. 255; State vs. Patton, 42 Mo. 530-537; Hewitt vs. Harvey, 46 Mo. 363; Reed vs. Inhabitants of Mertfield, 13 Pick. 94; McKeon vs. Citizens' R. R. Co., 42 Mo. 79; McDermott vs. Donnegan, 44 Mo. 85; Kennedy vs. N. Mo. R. R. Co., 36 Mo. 351; Hoffman vs. Ackley, 34 Mo. 277; Turner vs. Loler, 34 Mo. 461;

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Hunter vs. Miller, 36 Mo. 143 ; Orth vs. Dorschlein, 32 Mo. 366 ; Gullett vs. Hoynorton, 15 Mo. 400 ; Stephens vs. Bank of Missouri, 15 Mo. 143.

NAPTON, Judge, delivered the opinion of the court.

This suit originated in Pulaski county, but was removed to Miller county at the instance of defendant. The petition in the case is as follows :

"Plaintiff states that she was the wife of Samuel White, late of the county of Pulaski, deceased ; that James G. Maxey, of the county of Pulaski aforesaid, on the third day of April, A. D., 1873, with force of arms, did wrongfully shoot and mortally wound her husband, Samuel White, of which mortal wound her husband, Samuel White, on the fourth day of April, 1873, died ; that the defendant, James G. Maxey, wrongfully shot and killed her husband with a pistol loaded with gunpowder and ball, which the defendant then and there in his hand had, held and shot off and discharged at and against the right side of her said husband, Samuel White, inflicting a mortal wound, of which said mortal wound her said husband, Samuel White, on the fourth day of April, 1873, died. Plaintiff further states, that the death of her said husband, Samuel White, was caused by the wrongful act of the defendant James G. Maxey, by the means and in the manner aforesaid."

"Plaintiff states that by the wrongful act and means aforesaid, done and used by the defendant, James G. Maxey, by shooting and killing her said husband, Samuel White, she is damaged to the amount of five thousand dollars, for which she asks judgment."

To this petition there was a demurrer which was overruled, and the defendant filed an answer denying all the allegations of the petition, and affirmatively declared the facts to have been as follows :

"That at the time and place mentioned in the petition, the said Samuel White did, with two stones, one of the size and weight of two pounds, the other of the size and weight of four pounds, in and upon the body of the defendant, wilfully, unlaw-

fully and feloniously make an assault, with the intent, the said defendant, then and there to kill and murder; that the defendant was then and there, and thereby, placed in great danger; that the defendant, to defend himself and to save himself from great bodily harm, and to save his own life, did shoot the said Samuel White, using no more force or violence, and doing no more damage, than was necessary to defend himself and save himself from great bodily harm, which is the same shooting mentioned in the petition."

To this answer there was filed a replication denying the facts stated in the answer.

The case was tried at the April term, 1874, of the Miller county circuit court. There was a verdict in favor of the plaintiff, for three thousand dollars, and the usual motions for a new trial and in arrest of judgment.

It is unnecessary, to an examination of the questions presented for our decision, to give any details of the testimony. There is very little, if any, discrepancy among the witnesses as to the main facts, which appear to have been about as follows:

White and Maxcy were neighbors. On the morning of the third of April, after breakfast, White went over to Maxcy's to get a mule colt, which had strayed away, and was in Maxcy's stable; and while there, a dispute arose about some rails. During this dispute very offensive language was used on both sides, and Maxcy had a knife in his hands. White, being incensed at the epithets being bestowed on him, asked Maxcy to lay down his knife, and, pulling off his coat, invited him to a fair fight. Maxcy, then, declining the proposed combat, sent his son off to the house, which was distant about seventy yards from the place where this controversy arose, for his pistol, and whilst the boy was gone to the house, White picked up two stones and threw them at Maxcy, who retreated and dodged them. White then mounted his horse and started for home, but Maxcy, who had been previously retreating, meeting his son and getting the pistol from him, turned around and started after White, who was riding off on a stallion; whilst Maxcy was thus pursuing White with a pistol in his hands, White got down from his horse, on the



side farthest from Maxcy, and stooped down, either with a view to pick up a rock, or as seems most probable, to avoid being shot. At all events, as the horse turned, so as to leave White's person exposed, Maxcy fired and killed him.

After the conclusion of the defendant's evidence, a motion was made, in the nature of a demurrer to the evidence, which again presented the question in regard to the sufficiency of the petition.

The instructions given by the court, at the instance of the plaintiff, were as follows :

1. "If the jury believe from the evidence, that the deceased, White, on or about the third day of April, 1873, went to the residence of the defendant, Maxcy, on hunt of a mule, and that whilst there, Maxcy, by his words and conduct, provoked White to offer to fight Maxcy if Maxcy would put up his knife, and that Maxcy sent his son to the house for his pistol, and that the said White afterwards called upon defendant to put up his knife and fight a fair fight, and that the defendant refused to put up his knife; that White picked up two stones, and that Maxcy retreated in the direction of his house, and that while so retreating White moved towards Maxcy and threw said stones at Maxcy with great force, and that one or both of them would have struck Maxcy had he not dodged the same, and that after White threw said stones, he turned toward his horse and got on him, preparatory to leaving, and that Maxcy, after the stones were thrown, proceeded towards his house till he met his son and obtained his pistol, and that said Maxcy, thereupon, returned with said pistol, and followed said White and shot him; then the said killing was wrongful, and the jury must find for the plaintiff, provided that they find that at the date of said killing plaintiff was the wife of deceased, even if they should further find from the evidence, that, as the defendant Maxcy approached White with his pistol, White stooped to pick up a rock, or that he did so pick up a rock, and the picking up or attempt to pick up the rock at such stage of the difficulty, was no justification for the shooting, and the jury must so decide."

2. "If the jury find for the plaintiff they will assess her damages at a sum not exceeding five thousand dollars."

3. "The right of self defense rests alone upon necessity, and does not imply the right of attack, and the plea of justification in self defense cannot avail in any case, when it appears that the difficulty was sought for or induced by the act of the defendant, in order to afford him a pretense for wreaking his malice. And if you find from the evidence, that the defendant, James G. Maxey, and the deceased had a difficulty, which resulted in the death of the deceased, and that the defendant commenced the difficulty or brought it on by any wilful or unlawful act of his, or that he voluntarily, and of his own free will and inclination, entered into the difficulty, then there is no self-defense in the case, and you should not acquit on that ground; and in that case it makes no difference how high the passion of the defendant may have arisen, nor how imminent the peril may have been in which the defendant was placed."

4. "It stands admitted by the pleadings in this case, that the defendant shot and killed the said White, at the time and place stated in the plaintiff's petition, and, therefore, if the jury shall find from the evidence that at the time of the death of said White, he was the husband of the plaintiff, then the jury must find for the plaintiff, and assess her damages at not exceeding five thousand dollars, unless the jury shall further believe from the evidence that such shooting and killing of said White by defendant was committed in resisting an attempt on the part of said White to murder defendant, or was committed in the lawful defense of defendant, when there was a reasonable cause to apprehend a design to commit a felony, or to do some great personal injury, and there was reasonable cause to apprehend immediate danger of such designs being accomplished."

The following instructions were also given for the defendant:

1. "It is the natural and legal right of every man to protect himself from the violence of others, and when it is necessary to protect his own life, or protect himself from great violence, he may do so, even to the extent of slaying his assailant."

2. "If the jury believe from the evidence that defendant Maxey had reasonable cause to apprehend a design upon the part of White to kill him, Maxey, or to do him some great personal

injury, and that there was reasonable cause to apprehend immediate danger of such design being accomplished, and Maxcy killed White in order to prevent White from killing him, or inflicting some great personal injury upon him, Maxcy, then the jury should find for the defendant."

4. "The jury are instructed that, in making up their verdict, they may take into consideration the physical power and ages of White and Maxcy, and their social relation to each other immediately prior to the difficulty; and if they believe from the evidence that White made threats against Maxcy, and that such threats were communicated to him, what apprehensions, if any, they would likely produce on the mind of Maxcy, together with the other evidence in the case."

The following instructions, numbered three and five, asked for by the defendant, were refused:

3. "The jury are also instructed, that it is not necessary, in order to find for the defendant on the ground of self-defense, that the danger should have been real or actual, or that such danger should have been then impending and about to be inflicted on Maxcy. It is only necessary that the jury should believe that Maxcy had reasonable cause to apprehend that there was immediate danger of a design on the part of White to kill him, or do him great bodily harm, and that it was necessary for him, Maxcy, to kill White in order to prevent him from the execution of such design upon the defendant."

5. "If the jury believe from the evidence that any witness in this case swore wilfully falsely to any material fact in the cause, they are at liberty to disregard the whole testimony."

In the progress of the trial the plaintiff, Mrs. White, being on the stand as a witness, stated that White was her husband; that they were married in North Carolina in 1857, and she produced a certificate of her marriage. The production of the certificate was objected to on the ground that the court could not take judicial notice that any such certificate was authorized by the State of North Carolina, and that there was no evidence to show that the party who solemnized the marriage was authorized so to do. The objections were overruled and an exception taken by

the defendant. The plaintiff also stated that her husband was thirty-six years old when he was killed, and that her family at that time consisted of herself and six children; that her husband was a man of good health, and able to provide for his family; that her oldest boy was sixteen years old at the time of the trial, and her youngest child was born on the fifth day of April, which was the day following the day on which her husband died. Objections were made to all this evidence, and exceptions taken to its admission.

During the examination of the defendant as a witness, he was asked the question by his counsel, whether, at the time of the shooting, he really apprehended that unless he shot White he, White, would inflict some great bodily harm upon him, Maxey. This testimony was objected to, and the objection was sustained by the court, and exception taken to its exclusion.

The sufficiency of the petition is one of the principal questions that has been discussed in this case. In the case of *Kennayde vs. Pacific Railroad* (45 Mo. 257) the same question arose on another section of the statute. The petition in that case stated facts which brought the case within the second section of the Damage Act, but made no reference to the act. In the present case facts are stated corresponding with those required by the third section of the same act. Neither of these sections created any new cause of action, but provided for a survival of a cause of action which existed at the common law, where the death of the party injured occurred, to certain representatives of the deceased party, and limited the amount of the recovery to a specific sum.

The facts stated in this petition show that White, if living, could have maintained an action at common law against Maxey for the injuries inflicted, but as at common law such actions would not survive, the facts stated are evidently based on the statute which provides for the survival of the action.

The cases of *Hewitt vs. Harvey* (46 Mo. 368) and *Lowe vs. Harriman* (8 Mo. 352) and *Walther vs. Warner* (26 Mo. 141), are not considered irreconcilable with the decision in *Kennayde vs. Pacific R. R.* The former were actions for penalties claimed under special statutory provisions, and it was held that in such

cases there must be some reference made to the statute, in order that the court might see that such penalties were claimed. Without such statutory provision there could be no such claim made, but in the case of Kennayde and in the present case, which is precisely the same in principle, the statute gives a cause of action to parties who, by the common law, had no right to maintain such an action, and, as this court held in the Kennayde case there was no need of any special reference, or any reference at all to the statute, we are not disposed to reverse that opinion.

In regard to the instructions that were given by the court in this case, it will be observed that they are substantially the same as those sanctioned by this court in the cases of *State vs. Shultz* (25 Mo. 128), and *State vs. Starr* (38 Mo. 274). The undisputed facts in this case, we are inclined to think, required no instruction whatever on the subject of self-defense. Had the shooting occurred when *White* was throwing stones, and the defendant was retreating, the question of self-defense might have arisen, but the shooting occurred when *White*, unarmed, as the defendant knew him to be, was riding off, and the defendant was pursuing him with a loaded pistol. Self-defense, in such a state of facts, seems to be out of the question, and we think the court might very well have refused to give any instructions on the subject.

The fifth instruction asked by the defendant, to the effect that the jury might disregard the testimony of any witness who, in their opinion, had wilfully sworn falsely, was undoubtedly correct as an abstract proposition, but this court has never held that such an instruction should always be given under all circumstances. Such an instruction is always calculated to intimate that, in the opinion of the court trying the case, some of the witnesses had testified falsely, and the court presiding at the trial is better qualified than we are to determine the propriety of giving or refusing such an instruction. Upon reading over the record, we are unable to perceive any ground for asking the instruction in the present case. The refusal of the instruction could certainly not have done the defendant any harm, since the only testimony which exhibited the least disposition to distort the

facts, was that of the defendant himself and his son, and we will do him the justice to say that, on the whole, his account of the affair was a very candid one, considering his position and the strong inducements for him to represent the facts in a manner which would justify him. We cannot imagine why such an instruction was asked on the part of the defense, but we are of opinion that its refusal is no ground of error. (*Iron Mountain Bank vs. Murdock*, 62 Mo. 70.)

The admission of the North Carolina certificate of marriage is, in our opinion, of no importance. The statement of Mrs. White that she was married to Mr. White in 1857, and that they had lived together ever since and had six children, was amply sufficient evidence of a marriage, unless there had been testimony offered to show that such cohabitation was illicit. The certificate was of no importance, and its rejection or admission was of no importance. It was sufficient that Mrs. White stated that White was her husband, and they had lived together for seventeen years. The evidence in regard to the age of her husband, his health, the number of her children, and their ages, we think was very material to enable the jury to estimate the damages occasioned by his killing.

The question propounded to the defendant, when on the stand as a witness, as to whether he really apprehended that, unless he shot White, he, White, would inflict some great bodily harm on him, Maxcy, was properly excluded. The answer to such a question would have been perfectly immaterial, and entitled to no weight whatever. The statute provides that a homicide shall be justifiable, "when there shall be reasonable cause to apprehend a design to commit a felony or to do some great personal injury, and there shall be reasonable cause to apprehend immediate danger of such design being accomplished." The question to be settled by the jury was, whether the defendant had reasonable cause to apprehend injury to his life or limb. It was a matter of no importance whether the defendant imagined himself to have reasonable cause to apprehend danger or not; his opinion about the matter was of no importance, and was not legitimate



evidence. It was for the jury to say, on the facts in evidence, whether the defendant had reasonable cause to apprehend danger to his life and limb, or not.

The judgment is affirmed. All the other judges concur.

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WILLIAM HOEN, Respondent, *vs.* THE ATLANTIC & PACIFIC  
RAILROAD COMPANY, Appellant.

1. *Corporations—Service of process on—Absence of chief officer, recital as to.*—  
The return of service of process on a corporation under the statute (Wagn. Stat. 294, §§ 26, 27), made by leaving a copy at a business office of the company, with the person having charge thereof, in order to be valid must recite that the chief officer is absent from, or cannot be found in, the county, and not merely and generally that he is absent. The proper inference from the latter recital is that he was absent from his office.

*Appeal from Jackson County Special Law and Equity Court.*

*James Carr*, for Appellant, cited: Wagn. Stat. 294, §§ 26, 27; *Hewitt vs. Wetherby*, 57 Mo. 276; *Waddingham vs. St. Louis*, 14 Mo. 190; *Smith, adm'r vs. Rawlings*, 25 Mo. 410; *Stuart vs. Stringer*, 41 Mo. 404; *Jordon vs. M., K. & T. Ry.*, 61 Mo. 52; *Welton vs. Pac. R. R.*, 34 Mo. 358; *Williams vs. Hingham etc., Turnpike Co.*, 4 Pick. 341; *Bartlett vs. Crozier*, 17 John. 456; *Galpin vs. Page*, 18 Wal. 366; *Blanton vs. Jamison*, 3 Mo. 52.

*W. E. Sheffield*, for Respondent.

HENRY, Judge, delivered the opinion of the court.

This was a suit instituted in the Special Law and Equity Court for Jackson county by plaintiff against defendant, and the principal question is as to the sufficiency of the service of the summons.

The following is the sheriff's return:

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"I, C. B. L. Booth, Sheriff of Jackson county, certify that I executed this command by leaving a copy of this summons, together with a copy of the petition thereto attached, at a business office of the within named defendant, with A. W. Dickinson the person having charge thereof, in the absence of the president or chief officer of the defendant.

Done in Jackson county Missouri, this 6th day of January, 1875."

Wagn. Stat. 294, § 26, provides that "when any summons shall be issued against any banking or other incorporated company, service on the president or other chief officer of such company, or in his absence by leaving a copy thereof at any business office of said company with the person having charge thereof, shall be deemed a sufficient service, and if the corporation have no business office in the county where suit is brought, or if no person shall have charge thereof, and the president or chief officer cannot be found in such county, a summons shall be issued and directed to the sheriff of any county in this State where the president or chief officer of such company may reside or be found, or where any office or place of business may be kept of such company, and the service thereof shall be the same as above."

Section 27 is as follows: "On the return of such summons served as aforesaid, the officer serving the same shall express in his return on whom, how and when the same had been executed, and if not on the chief officer, he shall express the absence of such officer, or that he cannot be found."

These two sections taken together make very clear the meaning of section 26. If the service be not on the chief officer, the officer in his return must state his absence or that he cannot be found. That he cannot be found where? The county is the sheriff's bailiwick, and when a summons is delivered to him to be served, it is his duty to seek the party through his county, and then if he fail to find him, his return is that he could not find him in the county. But if he know that the president or chief officer of an incorporate company, against which he has a sum-

mons to serve, is absent from the county, the 28th section authorizes him to return that fact.

It is evident that the meaning of those sections is, that if the sheriff has reason to believe that the president or other chief officer of the defendant's corporation is within his county, he shall make the same effort to serve the summons upon him as in the case of a summons against an individual; but as it is common for corporations to do business in counties where the president or chief officer does not reside, the 27th section authorizes the officer, if he know that fact, to state the absence of the officer from the county as an excuse for resorting to the other mode of service provided by the 26th section. This view is strengthened by that portion of the 26th section which provides, that if the corporation have a business officer in the county, but no person can be found in charge thereof, and the president or other chief officer cannot be found in the county, a summons shall be issued directed to any county in the State, etc. The copy may be left with a person in charge of *any business office*, in the contingency mentioned, and this would authorize it to be left with a person in charge of a business office, other than that occupied by the president, as such, without any effort to serve the president at his office, if the absence spoken of in the statute be construed to be an absence from a business office of the company, and not an absence from the county.

In *Dixon vs. The Hann. & St. Joe. R. R. Co.*, 31 Mo. 407, Judge Ewing in delivering the opinion of the court, speaking of, and construing, the 26th section said, "the absence of the chief officer spoken of is not a temporary absence from the office usually occupied by him, but an absence from the county." If the meaning of the section is as we have construed it, the sheriff, if that was the fact, should have stated in his return that the president or other chief officer could not be found in, or was absent from, the county. It states that he was absent, but whether from the county or the office it does not state. A fair construction of the language of the return is that the copy was left with the person in charge of the office, because the president or other chief officer was absent from the office.

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The court erred in rendering a judgment by default, as the service was insufficient. And it follows, of course, that the final judgment was also erroneous, and must be reversed and the cause remanded.

All the other judges concur except Judges Hough and Norton not sitting.

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**WM. G. CLARK, Appellant, vs. ROBERT MITCHELL, et al., Respondents.**

1. *War power—Payment of rent to Provost Marshal in late war—Military seizure of private property—Powers of Congress—Act of March 3rd, 1863—U. S. Constitution, 5th amendment—Limitations, statute of.*—Where defendants, being sued on the covenants of their lease, pleaded that they had paid the rent reserved to the provost marshal of the district of Missouri, under and by virtue of the order of the military commander of that district; that the payment was omitted to be made to the plaintiff, and was in fact made for and on account of the plaintiff for the public use, as a necessary means of carrying on the military operations of the government of the United States in the State of Missouri, against the insurgents in said State, who were then seeking to overthrow said government, in said State; that said payment was made by virtue and under color of authority derived from and exercised under the President of the United States, and the act of Congress of March 3rd, 1863, and the two years limitation therein contained was pleaded in bar of plaintiff's action. *Held*, that the plea is insufficient on demurrer—and this, for divers reasons;

1st, It does not set forth the order on which defendant's rely, and thus tender a traversable issue.

2nd, The plea sets forth no impending necessity for the acts pleaded; which urgent necessity, admitting of no delay, is all that, even in time of flagrant war, will justify military seizure of private property.

3rd, Even if there had been such urgent necessity it could only have existed for *just so much money*, regardless of the *ownership*, and calling the money *plaintiff's* did not make it so, nor change that ownership.

4th, However the law may be in respect of the caption, during war, of personal property or of debts due the *enemy*, Congress does not possess the power to confiscate debts due from one citizen to another, and the act in question, in so far as concerns the case at bar, is clearly unconstitutional, in that it deprives the citizen of his property by giving sanction to a mere military order issued for that purpose; that this could not be done any more than Congress could *prospectively* authorize such seizure. Because under the 5th amendment of the

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Constitution of the U. S., Congress is inhibited from depriving the citizen of "life, liberty or property without due process of law," and from taking "private property for public use without just compensation."

5th, That the phrase "due process of law," or its legal equivalent "law of the land" does not mean a law enacted for the purpose of working the wrong; but the general law—law in its regular course of administration through the courts of justice; a law which hears before it condemns; proceeds upon inquiry and renders judgment only after trial. The act under consideration, possesses no attributes of this description, and is, for that reason, violative of the constitution.

6th, The act being thus unconstitutional, the statutory bar which contains, is unworthy consideration. Besides, the right of the plaintiff, under the terms of the lease, accrued in the year 1862. Our statute of limitations then gave, and still gives, ten years in which to bring suit for breach of the covenants in a lease, and Congress cannot, by a subsequently enacted law, deprive the plaintiff of the right which had thus accrued to him under our own statutes, nor overturn those statutes, nor interfere with the jurisdiction of our State courts—and the powers of Congress were not enlarged in consequence of the civil war to which the act refers.

7th, Granting that the act of Congress is in all respects valid, it can have no applicability to this case, since it appears that the defendants paid their own money, and not that of the plaintiff, to the provost marshal.

*Appeal from St. Louis Circuit Court.*

*Trusten Polk*, for Appellant.

*George P. Strong*, for Respondents, cited: *Brown vs. United States*, 8 Cr. 110; 1 Kent, pp. 59, 62, 64; Vattel, pp. 322, 323; 3 Grot. De Jure, &c. Chap. 8, § 4, *et seq.* 610; Hall. Intern'l Law, pp. 365, 447, 457; 6 Grot. Chap. 6, p. 580; Hall. Int. Law, 788, § 11; *Cross vs. Harrison*, 16 How. [U. S.] 164; 12 U. S. Stat. at Large [1863], 757, § 7; Const. Mo. art. 11, § 4; *Drehman vs. Stifel*, 41 Mo. 184, 202; Same case, 8 Wall. [U. S.] Supl. 595; *Clark vs. Tichnor*, 49 Mo. 144; *State vs. Gutzweiler*, 49 Mo. 17; *Clark vs. Dick*, 1 Dill. 8.

SHERWOOD, C. J., delivered the opinion of the court.

On the first day of February, 1859, plaintiff leased to the defendants for the term of seven years, two stores in block 96 on 4th street in the city of St. Louis, at a yearly rental of \$7,000 payable in monthly instalments of \$583.33. The rents for August, September, and October, 1862, were not paid in accord-

ance with the covenants in the lease contained, and this suit was brought in January, 1868, to recover those sums with interest.

The defendants answered, setting up four defenses to the action, and the plaintiff demurred; but inasmuch as the demurrant was successful respecting all the pleas except the fourth one, that alone is subject here to revision and discussion.

The plea thus held sufficient is as follows:

“ And for a further defense to said action, defendants say that the cause of action in plaintiff's petition alleged, if any such does or ever did exist, arose out of certain acts done and certain acts omitted to be done, that is to say, out of and from an alleged failure or omission to pay the rent reserved in said lease for the months of August, September and October, A. D., 1862, to the said plaintiff, and from a payment thereof made for and on account of plaintiff by defendant to the provost marshal of said district of Missouri for the public use, under and by virtue of the order and command of General J. M. Schofield, who was then in military command of the military district of Missouri, which embraced the State of Missouri; that said payment was omitted to be made to the plaintiff, and was in fact made for and on account of the plaintiff, for the public use as aforesaid, as a necessary means of carrying on the military operations of the government of the United States, against the insurgents who were then seeking to overthrow said government in said State of Missouri, by virtue or under color of authority derived from and exercised under the president of the United States; and said cause of action, if any such there be, or ever was, arose more than two years before the commencement of this action, and said action was commenced more than two years after the passage of an act by the congress of the United States, entitled an act relating to *habeas corpus* and regulating judicial proceedings in certain cases approved March 3d, 1863, and defendants set up and plead the limitations contained in said statute, in bar of said action and pray judgment, &c.”

The demurrer in substance alleged that the answer stated no facts sufficient to constitute a defense to the action.



It will be observed at the outset of our intended examination into the sufficiency of the plea, that it fails to set forth the order relied on either in *hæc verba*, or in substance. Without this were done, it would be impossible to traverse the special matter thus pleaded.

The plea on its face shows that which, if true, amounts to a wrong at common law; shows that the tenants of a lessor were compelled to attorn to a stranger, by paying him rent; but such a wrong, in order to be justified, must needs have the authority for its commission so pleaded as to tender a traversible issue; thus at once apprising the plaintiff of its nature, and allowing the court to determine its sufficiency. And no difficulty could be experienced in this regard, if the authority claimed really existed. (Pean vs. Beckwith, 18 Wall. 510.)

The above is not the sole objection to be urged to the plea.

There are doubtless cases in which a military officer may take, or destroy, private property, but this is only allowable under circumstances of imminent and overpowering necessity as, ex. gr.; where in time of flagrant war, forage or provisions are taken for troops, or a dwelling house used for the erection of bulwarks against an advancing enemy. But in such case, neither the officer who commands, nor those who obey, are liable to an action, nor to be regarded as trespassers, and therefore stand in no need of legislative protection. (Mitchell vs Harmony, 13 How. 115; Parham vs. Justices, &c., 9 Geo. 341, and cas. cit.)

That class of cases is, however, obviously distinguishable from those where a commander, influenced by motives of mere expediency, or ideas of *general necessity*, seizes and appropriates the property of individuals.

Thus in Mitchell vs. Harmony, *supra*, where it was pleaded that the property was taken to prevent it from falling into the hands of the enemy, and that it was taken for public use, Chief Justice Taney, in delivering the opinion of the court *inter alia* remarked: "The only subject for inquiry in this court is, whether the law was correctly stated in the instruction of the court; and whether anything short of an immediate and impending danger from the public enemy, or an urgent necessity for the public

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service, can justify the taking of private property by a military commander to prevent it from falling into the hands of the enemy, or for the purpose of converting it to the use of the public."

"The instruction is objected to on the ground, that it restricts the power of the officer within narrower limits than the law will justify. And that when troops are employed in an expedition into the enemy's country, where the dangers that meet them cannot always be foreseen, and where they are cut off from aid from their own government, the commanding officer must necessarily be intrusted with some discretionary power as to the measures he should adopt; and if he acts honestly and to the best of his judgment, the law will protect him. But it must be remembered that the question here, is not as to the discretion he may exercise in his military operations or in relation to those who are under his command. His distance from home, and the duties in which he is engaged, cannot enlarge his power over the property of a citizen, nor give to him, in that respect, any authority which he would not, under similar circumstances, possess at home. And where the owner has done nothing to forfeit his rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country or in his own. There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service, or take it for public use. Unquestionably in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser."

"But we are clearly of opinion that in all of these cases the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to

exist before the taking can be justified. In deciding upon this necessity, however, the state of the facts, as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others, as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous, will not make him a trespasser."

"But it is not sufficient to show that he exercised an honest judgment and took the property to promote the public service; he must show, by proofs, the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for the jury to say whether it was so pressing as not to admit of delay; and the occasion such, according to the information upon which he acted, that private rights must, for the time, give way to the common and public good."

"But it is not alleged that Colonel Doniphan was deceived by false intelligence as to the movements or strength of the enemy at the time the property was taken. His camp at San Elisario was not threatened. He was well informed upon the state of affairs in his rear, as well as the dangers before him. And the property was seized, not to defend his position, nor to place his troops in a safe one, nor to anticipate the attack of an approaching enemy, but to insure the success of a distant and hazardous expedition, upon which he was about to march. The movement upon Chihuahua was undoubtedly undertaken from high and patriotic motives. It was boldly planned and gallantly executed, and contributed to the successful issue of the war. But it is not for the court to say what protection or indemnity is due from the public to an officer, who, in his zeal for the honor and interest of his country, and in the excitement of military operations has trespassed on private rights. \* \* \* \* Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war, and the question here is whether the law permits it to be taken to insure the success of any enterprise against a public

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enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it."

"The case mentioned by Lord Mansfield, in delivering his opinion in *Mostyn vs. Fabrigas*, 1 Cow. 180, illustrates the principle of which we are speaking. Capt. Gambier, of the British Navy, by the order of Admiral Boscawen, pulled down the houses of some sutlers on the coast of Nova Scotia, who were supplying the sailors with spirituous liquors, the health of the sailors being injured by frequenting them. The motive was evidently a laudable one, and the act done for the public service. Yet it was an invasion of the rights of private property, and without the authority of law, and the officer who executed the order was liable to an action, and the sutlers recovered damages against him to the value of the property destroyed."

"This case shows how carefully the rights of private property are guarded by the laws of England; and they are certainly not less valued nor less securely guarded under the constitution and laws of the United States. \* \* \* \* \* If the power exercised by Colonel Doniphan had been within the limits of a discretion confided to him by law, his order would have justified the defendant even if the commander had abused his power, or acted from improper motives. But we have already said that the law did not confide to him a discretionary power over private property. Urgent necessity would alone give him the right; and the verdict finds that this necessity did not exist. Consequently, the order given was an order to do an illegal act; to commit a trespass upon the property of another, and can afford no justification to the person by whom it was executed."

The case of Captain Gambier, to which we have just referred, is directly in point upon this question; and upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify."

But conceding that the plea shows such circumstances of urgent necessity as would free the act from all culpability, and the

actor from all liability, by what process of ratiocination, by what *ingenious fiction* is it, that Mitchell's money, without payment or delivery to, or authority from Clark, becomes, *ipso facto*, the money of the latter, by a mere payment to a stranger?

If the defendants had died possessed of that money, would it not have passed to their legal representatives irrespective of the fact that they owed that precise amount to their lessor? Undoubtedly it would. This being true, it can but follow that *calling* the money *Clark's* neither alters its *status* nor changes its ownership. Besides, if the imminent necessity for the seizure of the money existed at all, it could have no possible connection with the fact of ownership, since, whether plaintiff's or defendant's, it would be equally effective in furnishing the munitions of war. In short, the necessity existed, if indeed it had an existence, *for just so much money*, regardless of whose coffers it enriched or whose purse it depleted; so that it becomes manifest that even the above made broad concession imparts no additional or supplemental efficacy to the defendant's plea.

Citation has been made by defendant's counsel to authorities as supporting the plea in respect to the caption of private debts, as occupying the same footing as personal property; though none of the authorities thus cited go further than to announce that doctrine in regard to debts due by citizens to the enemy with whom the nation is at war, and obviously can have no application to debts between citizens of the same nationality. And even in the case of the enemy's property remaining on land at the commencement of hostilities, it has been held it cannot be condemned as such without a special legislative act authorizing its confiscation, and that the declaration of war is not such an act. (*Brown vs. United States*, 8 Cranch, 110; 1 Kent Com., pp. 64, 65.)

But it surely will not be seriously contended that congress possesses the power to *confiscate* debts due from one citizen to another. And yet this must be the ultimate position of defendants in this regard if they rely on the act pleaded. For if the debt was not seized under circumstances which would justify the act irrespective of legislative enactment, then it results that the

subsequent ratification, so to speak, of the unlawful act, is neither more nor less in its effects, consequences and actuality, than *congressional confiscation*.

The temerity would be great which should assert that congress could, by the mere passage of a bill, authorize the *prospective* seizure of private property for public use, without just compensation: and yet "to this complexion must we come at last," if the defendant's view of the proper construction of the act under consideration be adopted, since no appreciable distinction can be taken between an act which beforehand gives permission and one which in the end gives sanction and protection.

And to say that congress possesses such powers, would be to accord to it the omnipotence claimed for the British Parliament. But our Federal Legislature is expressly inhibited by the Fifth Amendment to the constitution, from depriving the citizen "of life, liberty or property without due process of law," and from taking private property "for public use without just compensation."

That this article is thus restrictive of the action of congress and of the government, of which it is the legislative exponent, has been expressly adjudged. (*Barron vs. Baltimore*, 7 Pet. 243; *Withers vs. Bulkley*, 20 How. 84; *Twitchell vs. Commonwealth*, 7 Wall. 321.)

And it was, as the cases just cited, and the history of that period to which they refer, show, to quiet serious apprehensions respecting the encroachments of federal power, that gave origin to the adoption of the ten original amendments to the constitution. Whether these apprehensions were altogether groundless, let subsequent history say.

The right of private property has, in England, been almost as sedulously cherished and zealously guarded as that of liberty and life. The great commotions of that country have been, perhaps, as often brought about by illegal exactions and tortuous seizures of money or property, as by the gravest governmental aggressions against life and liberty.

A few extracts shall suffice to show how strongly cherished is the right of private property in that country: "It is indeed an



essential principle of the law of England, that the subject hath an undoubted property in his goods and possessions; otherwise there shall remain no more industry, no more justice, no more valour; for who will labor? who will hazard his person in the day of battle for that which is not his own?" (Broom Const. L. 228.) And this right is elsewhere termed "*jus indigenæ*, an old home born right, declared to be law by divers statutes of the realm." A "vital law of property" which though often infringed, "yet as often has parliament interposed to relieve the public liberty so endangered, and to repair the inroads on the constitution so made" (Ib. 234). And so jealously guarded was this "*home born right*," that it prevailed even against the royal prerogative. (Bankers Case, Turn. 11, 12.)

In the famous case of Entick vs. Carrington (19 St. Tr. 1030 [S. C.]; 2 Wils, 275), Lord Camden, C. J., said "the great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away by some public law for the good of the whole. The cases where this right of property is set aside, by positive law, are various. Distresses, executions, forfeitures, taxes, etc., wherein every man, by common consent, gives up that right for the sake of justice and the general good. By the laws of England every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges who are to look into the books and see if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment."

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And our own jurists, to their honor be it said, are no less emphatic, when treating of the right of private property. Mr. Justice Story, when speaking in reference to the 5th amendment before mentioned, says: "The next clause prohibits any person from \* \* \* being deprived of life, liberty or property without due process of law. This also is but an affirmance of a common law privilege, but it is of inestimable value. \* \* \* The concluding clause is that private property shall not be taken for public use without just compensation. This is an affirmance of a great doctrine, established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed in a free government, almost all other rights would become utterly worthless, if the government possessed an uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, where all property is subject to the will or caprice of the legislature and the rulers."

In *Calder vs. Bull* (3 Dall. 386), Chace, C. J., said; "The people of the United States erected their constitutions or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty and to protect their *persons* and *property* from violence. The purposes for which men enter into society will determine the *nature* and *terms* of the *social* compact, and as they are the foundation of the *legislative* power, *they* will decide what are the *proper* objects of it. The *nature* and *ends* of *legislative* power will limit the *exercise* of it. This *fundamental* principle flows from the very nature of our free republican government, that no man should be compelled to do what the laws do *not* require, *nor to refrain* from acts which the laws permit. There are acts which the Federal or State legislature cannot do *without exceeding their authority*. There are certain *vital* principles in our *free republican* government which will determine and overrule an *apparent* and *flagrant* abuse of legislative power, as to authorize *manifest injustice by positive law*, or to take away that security for *personal lib-*

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erty, or *private property* for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the *great first principles* of the social compact, cannot be considered a *rightful exercise* of legislative authority. The obligation of a law in governments established on *express compact and on republican principles* must be determined by the *nature* of the *power* on which it is founded.

A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no *existing* law, a law that destroys or impairs the *lawful private* contracts of citizens; a law that makes a man a *judge in his own cause*; or a law that takes *property* from A. and gives it to B. It is against all reason and justice for a people to entrust a legislature with *such* powers, and, therefore, it cannot be presumed that they have done it. The *genius*, the *nature* and the *spirit* of our State governments amount to a prohibition of *such acts of legislation*, and the *general principles of law and reason* forbid them. The legislature may enjoin, permit, forbid and punish; they may declare *new* crimes and establish rules of conduct for *all* its citizens in *future* cases; they may *command* what is right and *prohibit* what is wrong, but they cannot change *innocence* into *guilt*; or punish *innocence* as a *crime*; or violate the right of an *antecedent lawful private contract*; or the *right of private property*. To maintain that our Federal and State legislature possesses *such powers*, if they had not been *expressly* restrained, would, in my opinion, be a *political heresy* altogether inadmissible in our free republican governments.

In *Fletcher vs. Peck*, (6 Cranch. 87) Chief Justice Marshall said: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?" In *Wynehamer vs. The People*, (3 Kern 378) where a most elaborate and exhaustive discus-

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sion and review of the authorities occurs, it is said by Comstock, Judge, among other things: "I am brought, therefore, to a more particular consideration of the limitations of power contained in the fundamental law; \* \* \* "No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." These provisions have been incorporated in substance, into all our State Constitutions. They are simple and comprehensive in themselves, and I do not perceive that they derive any additional force or meaning by tracing their origin to *Magna Charta*, and the later fundamental statutes of Great Britain. In *Magna Charta* they were wrested from the king as restraints upon the power of the crown. With us they are imposed by the people as restraints upon the power of the legislature. No doubt, it seems to me, can be admitted of the meaning of these provisions. To say as has been suggested, that "the law of the land," or "due process of law," may mean the very act of legislation which deprives the citizen of his rights, privileges or property, leads to a simple absurdity. The constitution would then mean that no person shall be deprived of his property or rights, unless the legislature shall pass a law to effectuate the wrong; and this would be throwing the restraint entirely away. The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him; not by an act of the Legislature, but in the due administration of the law itself, before the judicial tribunals of the State. The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is, or at least it cannot be created by a legislative act which aims at their destruction. Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer; nor will it make any difference, although a process and a tribunal are appointed to execute sentence. If this is the "law of the land" and "due process of law," within the meaning of the constitu-

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tion, then the legislature is omnipotent. It may, under the same interpretation, pass a law to take away liberty or life without a pre-existing cause, appointing judicial and executive agencies to execute its will. Property is placed by the constitution in the same category with "liberty and life."

When speaking of a similar clause in constitution of Pennsylvania, and of the right of property protected by it, Chief Justice Gibson said: "What law? Undoubtedly a pre-existent rule of conduct, not an *ex post facto* rescript or decree made for the occasion. The design of the convention was to exclude arbitrary power from every branch of the government; and there would be no exclusion of it if such rescripts or decrees were to take effect in the *form of a statute*. The right of property has no foundation or security but the law, and when the legislature shall successfully attempt to overturn it, even in a single instance, the liberty of the citizen is no more." (Norman vs. Heist, 5 Watts. & Serg. 193.)

Chancellor Kent says: "The better and larger definition of due process of law is, that it means law in its regular course of administration through courts of justice." (2 Kent 13.)

Chief Justice Ruffin, when discussing a clause in the Constitution of North Carolina, similar to the one under consideration, said: "In reference to the infliction of punishment and divesting of the rights of property, it has been repeatedly held in this State, and it is believed, in every other of the Union, that there are limitations upon the legislative power, notwithstanding those words; and that the clause itself means that such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it is vested, according to the course, mode and usage of the common law as derived from our forefathers, are not effectually 'laws of the land' for those purposes." (Hoke vs. Henderson, 4 Dev. 1.) It would scarcely seem necessary so frequently to recur to the meaning of the phrase "due process of law," or its legal equivalent, "law of the land," and



we should not now do so were it not that frequent recurrences to rudimentary and fundamental principles cannot be out of place whenever such recurrence concerns any of the constitutional rights of the citizen. It was customary with the fathers and the earlier writers to make frequent mention of those rights, to regard them as of *primal* and all others of *secondary* importance, to advert to them and their perpetuity as the *chief* end for which *the government, under the constitution*, was established.

Mr. Justice Cooley, in his work, (Const. Lim. 353) says: "Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case." "By the law of the land, is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land."

The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they "proceed upon inquiry," and "render judgment only after trial." It is entirely correct, also, in assuming that a legislative enactment is not necessarily the law of the land. The words "by the law of the land," as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two Houses: "You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose." In other words, "you shall not do the wrong unless you choose to do it."

In a cause recently decided in Maine, where the legislature had passed an act authorizing the land agent to seize and sell, without legal process, the teams and supplies of alleged trespassers on public lands, it was held that the act was void, both under the State Constitution and under the Constitution of the United States,



which, by the first section of the fourteenth amendment, declares : "Nor shall any State deprive any person of life, liberty or property, without due process of law." And the court there pertinently says : "Where the State undertakes to confiscate a person's property upon the ground that it has been used in committing a trespass upon public lands, something more is necessary than an *ex parte* determination and command of the land agent. It will be noticed that the same protection is secured to property as to life and liberty. Will any one contend, that it is competent for the legislature to pass an act, authorizing the land agent to seize the person of the trespasser upon the public lands, and hang him, or imprison him for life, without any other trial of his guilt than the *ex parte* determination of the land agent himself, and no other authority than his own personal command? Of course not. No more is it competent for the legislature to pass an act authorizing the land agent to deprive a person of his property in such a summary mode ; for what is due process of law in one case must be equally so in the other. In the Constitution, life, liberty and property are all grouped together in one sentence, and the same protection which is secured to one is secured to all." (Dunn vs. Burleigh, 62 Me. 24.) And in a cause still more recently decided by the same court, (City of Portland vs. City of Bangor) it was held in consequence of the amendment just referred to, that a *pauper could not be sent to the work house*, under a warrant signed by two overseers of the poor, on an *ex parte* hearing. "If," says Watson, J., in delivering the opinion of the court, "*white* men and women may be summarily disposed of at the *North*, of course, *black* ones may be disposed of in the same way at the *South* ; thus the very evil, which it was particularly the object of the fourteenth amendment to eradicate, will still exist. The objection to such a proceeding does not lie in the fact that the persons named may be restrained of their liberty, but in allowing it to be done without first having a judicial investigation to ascertain whether the charges made against them are true ; not in committing them to the work house, but in doing it without first giving them an opportunity to be heard." (Cent. L. Jour. Vol. 3, No. 41, p. 651.) In the case at bar,

the law whereon defendants rely, does not at all accord with Mr. Webster's definition. For it is in no sense "*the general law*;" on the contrary, it is as much a partial and special one, as though in direct terms it had authorized and commanded the seizure which the plea justifies. A provision of the constitution of Vermont requires "that when an issue in fact, proper for the cognizance of a jury, is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred." And in *Plimpton vs. Town of Somerset* (33 Vt. 283) the effect of an act for a compulsory reference of suits at law is considered; and the court there says "holding this suit therefore to be one 'proper for the cognizance of a jury' we are next led to inquire whether the provisions of the act of 1856 do not materially impair the right of trial by jury. The act provides for a trial by commissioners, and for a report of the commissioners, stating the facts they find proved. When this report is made, the court are to render judgment upon it, unless either of the parties shall elect to have a trial by jury. The party electing to have a jury trial, must make a statement in writing of the material particulars in which he expects to change the result of the report. Thereupon a trial by jury may be had, but the statute says; "At the trial the report shall be *prima facie* evidence of the facts," and "the verdict shall be specifically upon the facts put in issue by the statement in writing." It is in this clause that the infringement of the right is alleged to exist. The mere providing of a preliminary trial by commissioners would not of itself impair the right, so long as the party could appeal from their decision and have a full and fair trial by jury. (*Beers vs. Beers*, 4 Conn. 535; 3 Gray, 476.)

A trial by jury, within the meaning of the Constitution, not only supposes that the controversy between the parties shall be submitted to twelve jurors, but that it shall be submitted to them upon the evidence; that it shall be submitted to them for their minds to weigh the evidence, unaffected by the opinion or judgment of any other tribunal in regard to it. It is to be a *trial*, the hearing of evidence and argument, and the deciding upon them, not the acting upon conclusions which some other tribunal

has drawn from the evidence and argument. It is to be a *trial* by *jury*. The jurors are to hear for themselves, to use their own judgment, and the verdict is to be the result of their deliberation and reflection upon the testimony and argument. If the judgment of some other body, upon the same matters, is substituted for, and is to control the decision of their minds, their action upon the subject ceases to be a trial and becomes but the mere recording of a verdict made for them by others. If the judgment of another body is so substituted *in part*, the right is impaired to the extent of the substitution. Herein lies the fatal objection to this clause of the statute. By making the judgment of the commissioners *prima facie* evidence, it enables one party to obtain a verdict without any showing whatever at the outset. \* \* \* \* This is not "holding the trial by jury sacred." It rather makes it incumbent on the court, in the eloquent language of Judge Blackstone, "to guard with the most jealous circumspection against the introduction of new and arbitrary methods of trial, which, under a variety of plausible pretenses, may, in time, imperceptibly undermine the best preservative of English liberty." In the present instance the issuance of the military order, as relied on by the plea, is the *all-sufficient and conclusive answer to any action*. Its *simple issuance* being proven, all other evidence is at once rejected, and all further investigation forthwith ceases. If in Plimpton's case it was violative of the constitutional right of trial by jury to allow the report of commissioners, who, duly appointed and sworn, heard and reported the facts they regarded as proved, to be even *prima facie* evidence of those facts, how much more is that act an invasion of constitutional right, which makes a mere arbitrary military edict a *conclusive bar* to a plaintiff's recovery?

Under the operation of such an act, the jurors have no voice of their own in the matter; but in the expressive language of the case just cited, "*their action upon the subject ceases to be a trial and becomes but the mere recording of the verdict made for them by others.*"

It would seem clear, beyond question, that a law which accomplishes such results must be one which condemns *without* hearing, proceeds *without* inquiry, and renders judgment *without* trial; possessing, in short, all those attributes, and none other than those which pertain to "*legislative judgments and an exercise of judicial power.*" (3 Dall. *supra.*) No one would contend, since the adoption of the 14th amendment, above cited, that a State could deprive any citizen of life, liberty or property, but in accordance with the law of the land, without acting in conspicuous violation of the Constitution. Shall it be said that the 14th amendment is binding on the State legislature, while the 5th amendment may be, at pleasure, disregarded by the federal legislature? Surely not. That instrument must apply with equal and controlling potency alike to *all* legislative assemblies, whether State or National, and an act passed by *either* clearly repugnant to the Constitution, must, when brought for review before the courts, unless they indeed prove recreant to their official trust, receive the seal of condemnation and be pronounced void. That the legislatures of the respective States are amenable to the restrictions and prohibitions of the constitution, has been repeatedly adjudged. (Dartmouth College vs. Woodward, 4 Wheat. 518; New Jersey vs. Wilson, 7 Cr. 164; Tenett vs. Taylor, 9 Cr. 43; Town of Pawlett, Id. 292.)

And these restrictions are not confined to the State legislatures alone, but the States themselves are held bound thereby; preventing them, even by an amendment of their organic law, from interfering with vested rights. (Dodge vs. Woolsey, 18 How. 331.) If the legislature of the *nation* is not thus restrained and prohibited, of what avail or of what force and effect are the most solemnly ordained constitutional guarantees? None, whatever. And if this be so, the result will be that the trinity of human rights, *life, liberty and property*, specially designated in the Constitution as worthy particular protection, will be held not as matters *fundamentally established*, but by the *slender* and *precarious* tenure of the *will and caprice* of the party, which for the time being, bears sway in the councils of the nation. Such a result cannot be, even for a moment, contemplated

without unfeigned dismay. The constitutionality of the act in question, has not, that we are aware of, been directly passed upon by the Supreme Court of the United States, though brought to the attention of that court in *Mayor vs. Cooper* (6 Wall. 247) and also in *Bean vs. Beckwith*, *supra*, but in neither case was the point adjudicated. In the latter, the validity of the act of 1863, and that of 1867, was only assumed for the purposes of that case. In some of the State courts, however, the constitutional validity of the act before us has been expressly denied. Thus, in *Johnson vs. Jones* (44 Ill. 142) where the defendants, Jones and others, sued in trespass for arrest and false imprisonment of the plaintiff, justified, and in their plea alleged, the existence of the rebellion; that plaintiff was an active member of the "Knights of the Golden Circle," and that defendant Jones, as a United States marshal for the Northern district of Illinois, arrested and conveyed the plaintiff to Fort Lafayette, by the order of the president of the United States. And the court there says: \* \* "The denial by congress, through a retrospective law, of all redress to a person whose property or liberty was illegally taken under a military order, is a mode of discharging obligations, which, however convenient, is not reconcilable with the principles of the Constitution. The Constitution confides to congress only legislative power, and that to be exercised only for specific purposes. When, therefore, it undertook to determine in 1863 and 1866, that no injury to person or property committed prior to that time, gave to the injured party a vested right of action, if committed under a military order, it assumed a judicial function which it is not authorized to perform. Whether this plaintiff was illegally arrested and imprisoned in 1862, depends solely upon the acts done and the laws in force at the time; and these are facts to be determined by judicial investigation, and facts which no act of congress can change. If his personal liberty or property was illegally taken from him, then at once accrued to him a right to redress in the courts, which no subsequent act of Congress can take away. The rights of person and property are equally secured by the constitutional provisions borrowed from Magna Charta, that no person shall be



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deprived of them without due process of law. That congress has no power, by its own act, to divest these rights, is universally conceded, and we are unable to perceive the difference in principle between an act seeking to divest them directly, and one providing that where they have been divested, by unlawful violence, no remedy shall be had against the wrong doer. Suppose congress should pass a law that no action should lie against a marshal for any illegal acts theretofore done by him under color of his office, and a marshal should be sued for having, before the passage of the law, illegally taken the goods of one person under an execution against another, can it be supposed such an act would be a defense to a suit brought for the trespass? And there is no difference in principle between such legislation and that now under consideration. In 1862, on the facts disclosed by this record, one citizen of Illinois committed a trespass upon the rights of another, for which the laws of Illinois then gave, and now give, a right of action. Since that time congress has said the action shall not be maintained. We must respectfully ask, whence comes the power to interfere with the remedies furnished by the State laws, through the State tribunals, for the injury of one citizen by another? There is, really, nothing to be said in support of this legislation. With all our respect for congress, we must hold these acts beyond its constitutional authority. If they are not so, its power, over person and property, is limited only by its own discretion, and constitutional government is merely a theory." In Indiana a similar result has been reached, and the act of March 3d, 1863, pronounced unconstitutional, where it was attempted to shield a provost marshal under its provisions, who had caused an illegal arrest. (*Griffin vs. Wilcox*, 21 Ind. 370.)

If the act being considered is unconstitutional, its statutory limitation of actions to two years is wholly unworthy consideration. But the right of Clark accrued under and by virtue of the written lease in 1862. And under our statute then, and still existing, he had ten years wherein to bring his suit after the breach in the covenants in the lease contained. And we emphatically deny that congress possesses the power to overturn



our statutes or interfere with the jurisdiction of our State courts, (Johnson vs. Jones; Griffin vs. Wilcox, *supra*; Bumpass vs. Taggart, 26 Ark. 398, and cases cited), and its powers in this regard were certainly not *enlarged* because of the prevalence of the civil war, to which the act refers. To employ the forcible language of Mr. Justice Davis, in the Milligan case (4 Wal. 2): "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers, with the shield of its protection, all classes of men at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man, than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government within the constitution has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

To summarize our conclusions in this matter, we regard defendant's plea insufficient, because:

- 1st. It shows no overwhelming necessity for the act done.
- 2d. That the law relied on, is, so far as concerns the case at bar, unconstitutional.
- 3d. That being thus unconstitutional, the two year's bar which it enacts is inoperative, and our own statute of limitations must govern.
- 4th. That even if the act were in all respects valid, it could not, for the reasons stated, have the slightest applicability to the case before us.

Holding these views, we shall reverse the judgment and remand the cause. All the other judges concur.

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State to use Kelly v. Cobb, et al.

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STATE TO USE J. T. KELLY, Respondent, vs. L. H. COBB,  
*et al.*, Appellants.

1. *Damages, measure of.*—Constable, suit on bond of.—Evidence.—Where it is shown by the evidence, that the plaintiff had recovered a judgment, that execution issued and was levied by the constable upon property equal or exceeding in value the amount of the execution, a *prima facie* case for recovery is established.
2. *Damages, measure of.*—The measure of damages in such case is the amount of the plaintiff's recovery in the former action.

*Appeal from the Special Law and Equity Court of Jackson County.*

W. E. Sheffield, for Appellants.

Frank Titus, for Respondent, cited: Sedg. Dam. [4th ed.] 592; State to use of Liecher vs. Miller, 48 Mo. 251; Wagn. Stat. 844, § 19, *et seq.*

NORTON, Judge, delivered the opinion of the court.

This was a suit instituted before a justice of the peace of Jackson county under Wagn. Stat. 844, § 19, against defendant, Cobb, and the securities on his bond as constable. The statement filed with the justice alleged that an execution in favor of plaintiff for \$36.05, was delivered to defendant, Cobb, who was a constable; that it was levied upon property of the defendant in the execution of the value of ninety dollars; that from the proceeds of said property, or the property itself, said constable received ninety dollars, and that said defendant had wholly failed to pay said plaintiff the sum of \$36.05, the amount of his judgment.

There was a trial and judgment for plaintiff before the justice, from which an appeal prosecuted to the law and equity court of Jackson county, where, upon a trial *de novo*, judgment was again rendered for plaintiff, from which defendant has appealed to this court. The principal point relied upon by defendant, as shown by the evidence, was that the goods which had been levied upon by the constable were taken from him by a writ of replevin, and were afterwards sold by the sheriff of Jackson county and not by him.

The evidence on this point was conflicting, but inasmuch as the case was tried by the court sitting as a jury we deem it unnecessary to determine on which side it preponderated, and shall only consider the objection to the action of the court in giving the instruction asked for by plaintiff, and refusing those asked by defendant.

In plaintiff's instruction the court declared that if the plaintiff obtained judgment before a justice of the peace, as alleged in his complaint, upon which execution was issued and delivered to defendant Cobb, constable, who by virtue thereof, and of his office, seized on the goods and chattels of Forbes, the defendant, in the execution, and that said goods were liable to execution, and that Cobb subsequently sold said goods and failed to pay over the proceeds thereof to plaintiff, and that the goods so seized and sold were of the value or amount of said execution and cost, then there was a breach of the bond rendering his sureties liable, and the rule of damages is the amount of plaintiff's said judgment.

The following instructions on the part of defendant were refused: 1. That the plaintiff must show that defendant, Cobb, received and obtained something from the proceeds of the property levied upon, if any such was levied on, and the plaintiff cannot recover in this action unless he shows that said Cobb, as constable, collected money on said execution, and that although Cobb might have levied the execution on the property, yet, unless the evidence shows he conveyed the same into money, the plaintiff cannot recover.

That the plaintiff's right to recover is limited in this case to the amount of money, with interest, which it is shown defendant, Cobb, collected on the execution, which he had after deducting cost; and the value of the property taken on the execution is no measure of damages. The first of these instructions is erroneous in this that it required the plaintiff to show that Cobb, the constable, received something from the proceeds of the sale of the property levied upon before he could recover. When a levy and sale of property is shown by plaintiff, of property equal or exceeding in value the amount of the execution, he makes a

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*prima facie* case of his right to recover the amount of his execution; and the burden of overthrowing such case rests upon the defendant. (State to use of Letcher vs. Schar, 50 Mo. 393; State *ex rel.* McDonald vs. Langdon 57 Mo. 393.) The second instruction is open to the same objection as the first.

We think the law of the case was fully embraced in the instruction given for the plaintiff. Under it, the court, before giving a verdict for plaintiff, was required to find that an execution issued upon a judgment in plaintiff's favor, which was placed in the hands of the constable, and was by him levied upon goods of defendant in the execution, subject to execution; that the goods were by him sold, and were of the value or amount of plaintiff's judgment, and that defendant failed to pay over the proceeds thereof. The measure of damages upon these facts was properly declared in the instruction to be the amount of the judgment. It is also urged as an objection that the instruction was erroneous because there was no evidence that the property was sold. The return made by Cobb shows that an extension table and four boxes of goods had been levied on, and also shows a charge of \$5.00 for keeping goods and \$1.00 for advertising.

Kelly states in his evidence that some of the goods were sold on the public square and Cobb states that he sold the goods under other executions.

Judgment affirmed in which the other judges concur, except Sherwood, C. J., absent.

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H. M. HOLDEN, Defendant in Error, *vs.* S. D. VAUGHAN, *et al.*,  
Plaintiffs in Error.

1. *Execution sale, motion to set aside on ground of fraud—Review of evidence—"Equity side" of court—Practice—Abolition of old distinction in forms; but retention of matter of substance in pleadings.*—On motion to set aside an execution sale, on the ground of fraud; *Held*, 1st, that this court would not review the evidence, this being a *law case*, notwithstanding the allegation of fraud. 2d, That the only way to reach the "*equity side*" of the court, is not by *motion*, but by appropriate procedure; the distinctive characteristic of the two systems, Law and Equity, still remaining as well pronounced as before. *Sem- ble*, that mere inadequacy of price, insufficient ground for setting aside sale.

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*Error to Jackson County Circuit Court.*

*Wash Adams, Jr.*, for Plaintiff in Error, cited: State vs. The St. Louis Circuit Court, 41 Mo. 574; Nelson vs. Brown, 23 Mo. 13; Wooton & Wooton, vs. Hinkle, 20 Mo. 290; Neal vs. Stone, 20 Mo. 294; Stewart vs. Nelson, 25 Mo. 211, 309; Stewart vs. Severence, 43 Mo. 322; Turner & Knight vs. Adams, 46 Mo. 95; 1 Stor. Eq. Jur. § 193; Schofield vs. Temple, Eng. Chan. 155; Hartoop vs. Hartoop, 21 Bevan, 259.

*A. A. Tomlinson*, for Defendant in Error, cited: Hann. & St. Joe. R. R. vs. Brown, 43 Mo. 294; Duncan vs. Saunders, 50 Ill. 475; Boyd vs. Ellis, 11 Iowa, 97; Wallace vs. Berger, 25 Iowa, 456; King vs. Thrope, 26 Iowa, 283.

SHERWOOD, C. J., delivered the opinion of the court.

Motion to set aside, on the ground of fraud, a sale under execution; evidence conflicting; no declarations of law asked and motion overruled.

Repeated decisions of this court have established, if frequent adjudication has that effect, that in law cases we will not weigh the evidence. (*Garneau vs. Herthel*, 15 Mo. 191; *Irwin vs. Riddlesbarger*, 29 Mo. 340; *Wielandy vs. Lemuel*, 47 Mo. 322; *Cape Girardeau Mill Co. vs. Bruhl*, 51 Mo. 144; *Twiss vs. Hopkins*, 50 Mo. 393; *Doering vs. Saum*, 56 Mo. 479; *Beattie vs. Hill*, 60 Mo. 72; *Sangman vs. Hersey*, 43 Mo. 122; *Blankenship vs. N. M. R. R. Co.*, 48 Mo. 376.)

There is therefore, in this case, nothing for us to review. It seems to be thought that, because the motion charges *fraud*, this brings the case on the "*equity side*" of the court, and authorizes a review by us of the evidence. This position is untenable. If you may come on the equity side of the court with one motion, you may with another; and thus gain an undue advantage over your adversary, who would be unable to tender a formal and specific denial to the matter of the motion, and thus indirectly overthrow the prescribed method of pleading. Equitable aid must be sought in the usual way and cannot be obtained by *motion*. (*Hull vs. Sherwood*, 59 Mo. 172; *Phillips, Nimick &*

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Co., vs. Evans, 64 Mo. 17.) The cases of Stewart vs. Severence (48 Mo. 322), Turner vs. Adams (46 Mo. 95), Stewart vs. Nelson (25 Mo. 309), were all proceedings in the nature of bills in equity, the substance of the petition, and the nature of the relief prayed, being the same. In Nelson vs. Brown (23 Mo. 13), there was a rule to show cause why the sale should not be set aside, and to this an answer filed, setting forth in answer to the rule all that could have been set forth had the rule to show cause assumed the shape of a petition, and the cause was heard on the issues thus raised, and was, though irregular, in effect an *equitable* proceeding, and very much resembles in these respects, the case of Semple vs. Atkinson (64 Mo. 504).

In Wooten vs. Hinkle (20 Mo. 290), there was a special finding of facts, and the law was declared. This afforded opportunity to review the finding, as the finding of the facts was in the nature of a special verdict (Wielandy vs. Lemuel, 47 Mo. 322), or an agreed state of facts, and afforded something which this court could review, and this although the law was not declared. (Stone vs. Corbett, 20 Mo. 350.) In Neal vs. Stone (20 Mo. 294), the evidence was examined on the motion to set aside the sale, but in neither of the two cases just cited was the point, whether this court would weigh evidence in law cases, passed upon or considered.

Although the distinctions in the mere matter of *forms*, of pleading, has long since been broken down by the code, yet the distinctive and salient characteristics of the two systems, law and equity, still remain as well pronounced as before. (State vs. St. Louis Circuit Court, 41 Mo. 574.)

As to the inadequacy of the price realized at the sale, even could we look into the evidence, this would afford no ground for setting aside the sale, unless the inadequacy were so great as to shock the moral sense. (Hann. & St. Joe. R. R. Co. vs. Brown, 43 Mo. 294; Stoffel vs. Schroeder, 62 Mo. 147.)

For the foregoing reasons, and without passing on the merits of the case, which, under the circumstances, we must decline to do, we shall affirm the judgment; all the other judges concur.



## STATE OF MISSOURI, Appellant, vs. CHARLES F. KRING, Respondent.

1. *Murder, indictment for—Shackles on prisoner—Power of court in criminal trials—Rights of prisoner—Previous assault by.*—As a general rule, a prisoner is entitled, as a matter of right, to be freed from his shackles when brought into the court room for trial, but this rule is not of universal application. The court has the power to take all necessary steps to have the trial a quiet and safe one, even to binding the prisoner with fetters. But there must be some good and sufficient reasons for pursuing such extraordinary course, else the judgment of conviction will be reversed; and the fact that the prisoner had made, in the court room, an assault upon a person, will not justify his being shackled, three months thereafter, when put upon his trial.
2. *Sanity of prisoner—Letters of, when admissible in evidence—Secondary evidence.*—When the sanity of the prisoner is involved, a letter written by him, prior to the commission of the alleged offense, is admissible in evidence to throw light on the condition of his intellect at the time of the act charged. And on its being satisfactorily established that such letter was destroyed, secondary evidence of its contents ought to be admitted.
3. *Instruction erroneous respecting murder in first degree, but harmless.*—Where the lower court gave, for the State, an erroneous instruction respecting the constituent elements of murder in the first degree, as ruled in *State vs. Foster* (61 Mo. 548) and *State vs. Lane* (64 Mo. 319), but where the evidence showed that, if defendant was sane, the killing was done with malice premeditation and aforethought, and when the instructions for the defendant were very favorable, held, the error was not reversible error.
4. *Concluding arguments by circuit attorney—Improper remarks by circuit attorney—Distinction between civil cases and those involving life and liberty.*—The trial court should not permit the circuit attorney to indulge in a line of remark calculated to induce the jury to (do that very common thing) shirk responsibility, by throwing it on the higher courts. (*Lloyd v. H. & St. Jo. R. R. Co.* (53 Mo. 514), distinguished from the case at bar.

*Appeal from the St. Louis Court of Appeals.*

*J. L. Smith, Att'y Gen'l*, for Appellant, cited: *People vs. Harrington*, 42 Cal. 165; *Phillipson vs. Bates*, 2 Mo. 116; *State vs. Holme*, 54 Mo. 153; *State vs. Underwood*, 57 Mo. 40; *State vs. Starr*, 38 Mo. 270.

*R. S. McDonald, with Presley N. Jones*, for Respondent, cited: 16 Howell, *State Trials*, 94; 13 Id. 222; 5 Id. 979; 4 Bl. Com. 322; 1 Leach, 43; 2 Hale Pleas of Crown, 219; 1 Greenl. Ev. 102; 2 Id. 371; *Grant vs. Thompson*, 4 Conn. 203; *Pratt vs. Coffman*, 33 Mo. 76; *Dickinson vs. Barber*, 9

Mass. 225; Kinne vs. Kinne, 9 Conn. 102; McLane vs. State, 16 Ala. 680; McAlister vs. State, 17 Ala. 434; State vs. Scott, 1 Hawks, 32; Whart. Cr. Law, § 57; People vs. March, 6 Cal. 543; Wright vs. Tatem, 1 Ad. & El. 387; 7 Ad. & El. 313; U. S. vs. Sharp, 1 Pet. C. C. 118; State vs. Mary, 50 Mo. 81; Freleigh vs. State, 8 Mo. 612; Rucker vs. Eddings, 7 Mo. 116; State vs. Main, 31 Conn. 577; Hoskins vs. State, 11 Ga. 95; 22 Ala. 38; 21 Id. 549, 558; State vs. Foster, 61 Mo. 549; State vs. Dunn, 18 Mo. 421; State vs. Starr, 38 Mo. 270.

NAPTON, Judge, delivered the opinion of the court.

The defendant was tried and convicted of murder in the first degree, at the November term, 1875, of the Criminal Court of St. Louis, and sentenced to be hanged, but on an appeal to the Court of Appeals of St. Louis, the judgment was reversed and a new trial ordered, and from this last judgment of reversal the State appeals to this court.

As the opinions of the court of appeals are reported and published, it is unnecessary to review the ground upon which their judgment of reversal is based, in which we concur. The English authorities, to sustain the conclusion of the court of appeals, are referred to in the opinion, and also in the brief of the counsel for the defendant, in this court, to which may be added a decision in California (People vs. Harrington, 42 Cal. 165), referred to by the Attorney General. From all these cases, it seems very clear, that without some good reason, authorizing the criminal court to depart from the general practice in England and in this country, the shackles of the prisoner, when brought before the jury for trial, should be removed.

We have no doubt of the power of the criminal court, at the commencement, or during the progress of a trial, to make such orders as may be necessary to secure a quiet and safe one, but the facts stated by the court in this case, as shown by the record, that the prisoner had assaulted a person in court, about three months before the term at which he was tried, would hardly authorize the court to assume that, on his trial for life, he would be guilty of similar outrages. There must be some reason,

based on the conduct of the prisoner, at the time of the trial, to authorize so important a right to be forfeited. When the court allows a prisoner to be brought before a jury with his hands chained in irons, and refuses, on his application, or that of his counsel, to order their removal, the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers. Besides, the condition of the prisoner in shackles may, to some extent, deprive him of the free and calm use of all his faculties. We, therefore, concur in the opinion of the court of appeals on this point.

We have been unable to perceive, after a careful examination of the record touching that point, why the court refused to allow the contents of defendant's letter to Mrs. Broemser to be established by the witness called for that purpose, who proved their destruction, and who had read the letters. This occurred upon an examination of the second witness, introduced by the defendant to establish his defense, which was exclusively confined to the proof of insanity. Although we have been unable to find any case which decides precisely the question involved in this case, it seems to be generally conceded, that when the question is concerning the sanity or insanity of a person, his acts and declarations previous to, and up to the period, when his capacity for action or his responsibility for his acts is called in question, and even subsequently, are admissible to throw light on the condition of his intellect at the time such acts or declarations occur. His letters are certainly as valuable proof as his verbal declarations.

The case of *Wright vs. Doe, dem. Tatham* (7 Ad. & El. 317), contains a most elaborate discussion of this subject, both by the judges of the court of Queen's Bench, and in the Exchequer Chamber. The question in that case was as to the capacity of a testator, and letters written to him, and found in his desk after his death, were offered as evidence of his sanity at the time he made his will, although written twenty or thirty years before his death. A majority of the judges in both courts

did not consider the letters admissible, because, upon an examination of the testimony, they were of the opinion that sufficient evidence was not introduced to connect these letters with any act of the testator recognizing their reception. A minority of the judges in both courts, a separate opinion being delivered by each of the judges in both courts, thought the evidence sufficient of acts on the part of the testator, upon their reception, to authorize their introduction. All the judges agreed, that, without such connection being established between the letters and the action of the testator on their reception, the letters were inadmissible.

It will be observed that the letters in question were addressed to the person whose sanity was under consideration. In the present case, the letters proposed to be introduced were written by the defendant, whose sanity was called in question, and it would seem in such a case, that, in the opinion of the court who decided the case in *Wright vs. Doe*, there was no question of *their* competency, as declarations of his, to establish the condition of his mind at the time they were written. And if the letters were destroyed, their contents could be established by a witness who had read them. Of course, such letters could be no evidence of the facts stated in them, and the court should so instruct the jury, as was done by the criminal court in this case in reference to other letters introduced, which were found on the person of the prisoner when arrested.

The fifth instruction given by the court on the trial, was as follows: "When killing is done, not accidentally or by mischance, but wilfully, with intent to kill, even though such intent has existed for but a moment before the commission of the act, and with such malice as I have above defined—that is the wilful doing of a wrong act without just cause or excuse—it is murder in the first degree." This instruction, as applied to murder in the first degree, was erroneous, according to the decisions of this court in the case of the *State vs. Foster* (61 Mo. 548), and the *State vs. Lane* (64 Mo. 319). The instruction, however, as applied to the facts of the present case, was immaterial and harmless, since all the evidence offered on behalf of the defendant, as well as that offered for the State, proved that the killing

was premeditated and deliberate, if defendant was sane. There was no dispute on this point. The defense was based exclusively on the insanity of the prisoner, upon which subject the instructions given by the court are admitted to have been as favorable to the accused as the law justified.

A point has been made in regard to the propriety of certain remarks of the circuit attorney to the jury in his closing speech, which the bill of exceptions shows to have been as follows: "If you wrong the accused by finding him guilty, that wrong can be righted, because there are two courts above this, in which the accused can have this reversed, the Court of Appeals and the Supreme Court. If you are not justified in finding this man guilty, it is in their power to rectify any error, while, if, on the other hand, you turn the murderer loose in the community, no matter how frail might be the foundation on which you do it, and how frail may be the scaffolding, it takes him forever in the light of freedom again; you will make a wound in this community that will never be healed."

The statement that the higher courts referred to had the power to review the finding of the jury on the weight of evidence, was calculated to induce the jury to disregard their responsibility. It is unnecessary to decide whether such remarks from the counsel for the State would require the judge to grant a new trial, on their being brought to his attention in a motion for that purpose, since in this case a new trial has already been determined on. The judge presiding at the trial, in our opinion, should not have permitted such remarks to be made on the close of the argument, without a prompt correction. They were probably made through inadvertence, and in the excitement of argument, and we merely notice them to observe their impropriety. The circuit attorney represents the State, and it is presumable that the State has no wish to convict or punish an innocent man. He is employed to see that the laws against criminals are enforced, but he is not required to avail himself of his privilege of concluding the argument before the jury, to state propositions of law which are clearly untenable, with a view to influence the jury in the verdict. This was not a case involving property, but a proceeding involv-



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ing life, and the remarks of the court in the case of Llyod vs. Han. & St. Jo. R. R. Co. (53 Mo. 514), must be modified in their application to cases involving life or liberty.

As this case is remanded for a new trial, we decline to express any opinion on the weight of the testimony. That there was some evidence of insanity, seems conceded by the court which tried the case and instructed the jury on that subject. Whether the defendant was incapable of distinguishing between right and wrong, is a question for the jury who will hereafter try him. The instructions on this subject were as favorable to the prisoner as the law warranted, since what is called moral, as contra-distinguished from mental, insanity, is conceded to be insufficient to relieve a party from responsibility for crime.

The judgment of the court of appeals, ordering a new trial, is affirmed. The other judges concur, except Judges Hough and Norton, who were absent at the hearing.

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STATE TO USE OF J. F. WATKINS, *et al.*, Respondents, vs. PETER J. MISEREZ, *et al.*, Appellants.

1. *Action on official bond—Variance between allegations and proof—Title of officer—Legislative acts, construction of.*—Where the petition in suit on an official bond charged that the principal was elected by the voters of Kaw Township, gave bond as "*Marshal of the Kansas City Court of Common Pleas*," the bond was given by defendants for the faithful performance of the principal of his duties as "*Marshal of Kaw Township*;" that this was the only bond ever given by this officer, who thereupon proceeded to discharge the duties of marshal of that court in the discharge of which the breach occurred. But it also appeared that the legislature had, prior to the election in question, by divers "public acts," used the terms "*Marshal of the Kansas City Court of Common Pleas*" and "*Marshal of Kaw Township*," interchangeably, in designating the officer who was to execute the process of that court, and that the legislature also, prior to said election, had provided "that all official papers, acts and duties of the Marshal of the Kansas City Court of Common Pleas which \* \* \* shall be executed under the name and style of "*Marshal of Kaw Township*, \* \* \* shall be legal \* \* \* as if done under the name of the "*Marshal of the Kansas City Court of Common Pleas*." Held, that there was no variance between the *allegata* and the *probata*, since either method of designation would be equally effective in designating the ministerial officer of that court.



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2. *Instrument, construction of—Intention of parties—Attendant circumstances.—*

That the intention of the parties in signing an instrument is, if possible, to be adopted; which intention is to be gathered, if necessary, from the light of surrounding circumstances, and that construction is to prevail, which will make the instrument efficacious, instead of the opposite.

*Appeal from Jackson County Circuit Court.*

*Wm. E. Sheffield*, for Appellants, cited: Local Laws, 1855, p. 60, § 18.

*Gage & Ladd*, for Respondents, cited: Local Acts 1855, p. 60, §§ 1, 18; Sess. Acts, 1858-9, p. 354, § 8; Id. 1859-60, p. 9, § 1; *Peckham vs. Haddock*, 36 Ill. 38; *Colburn vs. Owens*, 10 Mass. 20; *Medway Cott. Manuf'g Co. vs. Adams*, 10 Mass. 360; *Richmond vs. Woodard*, 32 Vt. 836; *Huff vs. Hutchinson*, 14 How. 586; *Fosdick vs. Village, etc.*, 14 Ohio, [St.] 487.

SHERWOOD, C. J., delivered the opinion of the court.

Action on the official bond of defendant Miserez as principal, and the other defendants as sureties. The bond was conditioned for the faithful performance by Miserez of his duties as *Marshal of Kaw Township*.

The petition in substance alleges the election of Miserez as *Marshal of the Kansas City Court of Common Pleas*, by the voters of Kaw Township on the 6th of November, 1866, and the execution of the bond in suit, on the 20th of that month; that by an act of the general assembly approved Feb. 20, 1865, (Sess. Acts, 1865, p. 414) it was provided: "That all official papers, acts and duties of, and concerning the Marshal of the Kansas City Court of Common Pleas, which have been, or shall be performed and executed under the name and style of Marshal of Kaw Township, are, and the same shall be, legal and binding as if done and executed under the name of Marshal of the Kansas City Court of Common Pleas;" that the bond in suit was an official paper of and concerning the Marshal of the Kansas City Court of Common Pleas, was executed by Miserez and his sureties as and for his official bond as marshal of that court, was

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duly approved and filed according to law; that he never executed any other bond as marshal of that court; that on the approval of the bond declared on, he forthwith entered on and proceeded to discharge the duties as marshal of that court, and continued so to do until the expiration of his term of office. The petition then alleges the breach of the conditions of the bond, which breach consisted of the failure of Miserez, as Marshal of the Kansas City Court of Common Pleas, to pay to relators, certain money collected by him under certain attachment proceedings issued and directed to, and executed by him, as marshal of that court. The answer did not deny the execution of the bond, but was in substance a general denial of the allegations of the petition.

On trial of the issues joined, the breach assigned being fully established, judgment went for plaintiffs; and in this we discover no error, nor in the declarations of law which led to that result.

The act (Local Acts, 1855, p. 60, § 1) which established the "Kansas City Court of Common Pleas" limited its jurisdiction to "Kaw Township" and (Id. § 18) constituted the marshal of the city of Kansas, the ministerial officer of that court.

The jurisdiction was always thus limited until the act of December 5th, 1859, (Sess. Acts, 1859-60, p. 9, § 1) which authorized writs of attachment to be served anywhere within the county. Aside from this exception, the jurisdiction of that court was always confined within the territorial limits of "Kaw Township."

The act of March 2nd, 1859, (Sess. Acts 1858-9, p. 354, § 8) first created the office of "Marshal of the Kansas City Court of Common Pleas" and provided for the election of that officer, on the first Monday in August, 1859, by the qualified voters of that township. This act as well as the act of 1855, of which the former was amendatory, were "*declared public acts.*" Notwithstanding the ministerial officer of that court was designated by the act which created his office as "Marshal of the Kansas City Court of Common Pleas" the legislature, by a subsequent amendatory act, which was also declared a "*public act,*" ap-

proved December 5th, 1859, and above referred to, speak of that officer as "The Marshal of Kaw Township." This is done in repeated instances, (§§ 3, 4, 13, 14 and 15) and he is not once mentioned in that act by his true official designation of "Marshal of the Kansas City Court of Common Pleas," whose duties were declared by the act creating the office (Acts 1858-9, *supra*, § 14) to "execute all process issued by said Kansas City Court of Common Pleas."

It will be thus seen that the general assembly, with what wisdom it is unnecessary to say, chose, by two public acts, to designate one and the same officer, by the distinct appellation of "Marshal of the Kansas City Court of Common Pleas" and "Marshal of Kaw Township." That these terms were used interchangeably, is clear beyond question. Either method of designation is, therefore, equally effective as a mode of identifying the officer to which it referred. And these acts being "*public acts*," passed and in force years long anterior to the period when the defendants signed the bond for the faithful performance of the duties of the "Marshal of Kaw Township," cannot, when the principal in that bond proves a defaulter, escape liability by taking technical advantage of an alleged verbal variance in the title of an officer, who, as the evidence shows, was elected, took oath and gave bond, as "Marshal of Kaw Township," and during his entire term of office, as ministerial officer of the court, executed all process which was directed to and came into his hands, and performed all his official duties as "Marshal of the Kansas City Court of Common Pleas;" such being the style of all writs which he received. In the light of these acts of the legislature and of the evidence adduced at the trial, we can find no room to doubt the intention of the parties signing the instrument in suit, to assume a liability for the official acts of the ministerial officer of the court, wherein the bond was filed and approved regardless of the fact whether that officer had one title or another, and if there was any doubt whatever in this connection, as to the construction to be given the bond, that construction should prevail, which, in the light of attendant circumstances, would make the instrument efficacious, instead of meaningless and ineffective.

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Cordell, Pub. Adm'r, v. First National Bank of Kansas City.

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(Peckham vs. Haddock, 36 Ill. 38; Fordick vs. Village, 14 Ohio, [St.] 472; Richmond vs. Woodard, 32 Vt. 833 and cas. cit.)

And if any doubt should still remain, that doubt would certainly be resolved in favor of the plaintiffs, when reflection is had on the very comprehensive and liberal provisions of the act of Feb. 20th, 1865, *supra*, set forth in the petition and read in evidence.

The declarations of law were in harmony with these views, and the judgment is affirmed. All the judges concur.

—o—

HENRY CORDELL, PUB. ADM'R, Respondent, *vs.* FIRST NATIONAL  
BANK OF KANSAS CITY, Appellant.

1. *Certificate of deposit, interest on, after due—Judgment of affirmance with damages.*—Where a certificate of deposit by its terms matures six months after date, and is to bear six per cent. interest from date, it will continue to bear the same rate of interest until paid. And where a bank brings up a plain case like this, the judgment will be affirmed with ten per cent. damages.

*Appeal from Jackson County Circuit Court.*

*Tomlinson & Ross*, for Appellant, cited: *Payne vs. Clark*, 23 Mo. 259; *Pars. N. & B.*, Vol. 2, p. 393; *Ewd. B. & N.*, 2 Ed. 348, star paging.

*A. Comingo*, for Respondent.

SHERWOOD, C. J., delivered the opinion of the court.

The only question presented is, whether a certificate of deposit, payable six months after date with interest from date at six per cent. per annum, continues to bear that rate of interest, after the arrival of its maturity, although not presented when that period arrives.

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Marquis, et al. v. Clark.

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An affirmative answer to just this question was returned by this court, twenty-one years ago, in *Payne vs. Clark*, 23 Mo. 259.

Judgment affirmed, with ten per cent. damages. All the other judges concur.

—o—

CHARLES MARQUIS, *et al.*, Appellants, *vs.* ASHBURY CLARK, Respondent.

1. *Bill of exceptions—Record proper.*—Where the bill is stricken out on motion, nothing remains for examination but the record proper, and if no error be discovered therein, the judgment will be affirmed.
2. *Petition, two counts in, finding on but one—No motion in arrest, because no bill of exceptions—Attention of lower court not called to error.*—Where the petition contained two independent counts, but the finding for the defendant was only on the first, *held*, that this was not a general finding, and even if it were, the judgment should not be reversed, since there being no bill of exceptions, this court cannot know whether the attention of the lower court was called to the matter by appropriate motion.

*Appeal from Jasper County Common Pleas.*

*E. J. Montague*, for Appellants, cited: *Brownell vs. P. R. R. Co.*, 47 Mo. 239.

*W. H. Phelps*, for Respondent.

SHERWOOD, C. J., delivered the opinion of the court.

Since the bill of exceptions was stricken out, nothing remains for examination but the record proper.

The petition contains two counts, the first charging the unlawful detention of a quantity of shock corn, seeking its recovery and damages for its detention, the second count charging the conversion of 230 bushels of corn, and asking damages for its conversion. The jury found for defendant as to the first count, and assessed the value of the property, which it seems the plaintiff had replevied, but made no finding as to the second count. It has been stated that the finding was a general one, and that as

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Marquis, et al. v. Clark.

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there were two distinct and independent counts, and as there was a motion in arrest on this account, the error is fatal. But, as has just been seen, the finding was not general, and even if it were, there being no bill of exceptions, the motion in arrest has not been preserved.

We are unable to discover, in consequence of the absence of any bill of exceptions, that the attention of the lower court was called to the absence of any finding on the second count. Nor are we able to see that plaintiff has been prejudiced.

We therefore affirm the judgment; all the other judges concur.

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### ADMINISTRATION.

1. *Administrator—Note made payable to—Term administrator, etc., a surplusage or descriptio personæ, when.*—An administrator can maintain an action in his own name on a note made payable to him as administrator or executor, the official words being treated as mere surplusage or as *descriptio personæ*.—*Rittenhouse vs. Ammerman*, 197.

2. *Promissory note—Descriptio personæ—Executor, when personally liable on—Re-imbursement out of estate.*—In suit on the following note, to-wit: "three months from date promise to pay to order of A. and B. fifteen dollars" etc., etc., with interest at ten per cent. per annum, and if interest be not paid annually to become as principal," etc.

(Signed)

"P. H. Ammerman,

Executor of last will of James Johnson, deceased;"

it was held that as the instrument contained no words showing an intention to charge the estate, the terms "executor," etc., should be treated merely as *descriptio personæ*; that the fact of payment to be made at a future day with the interest named, might of itself be sufficient to show a personal undertaking of the executor; that the note of itself imparted a consideration and that it devolved on the maker and was competent for him, if he designed to set up that defense, to show that as his individual contract it was without consideration, and that the payee agreed to look only to the estate. And in such case where the consideration of the note accrued after death of the testator, the administrator will in the first instance be liable *de bonis propriis*; but he may re-imburse himself out of the assets of the deceased.—*Id.*

3. *Administrator—Sale of property by to satisfy purchase price contracted for by decedent—Petition—Appraisement—Dade Probate Court, jurisdiction of—Suit to divest title—Joinder of parties, etc.*—Where land purchased but not paid for by the intestate in his lifetime, is sold by the administrator for the payment of the purchase price, and there is due notice and report thereof, the sale may be legally made under the statute (Wagn. Stat. 93, 94, §§ 2, 3), without a petition therefor, or an appraisement of the property. And where such sale was made under the orders of the probate court of Dade county, that tribunal, under the Sess. Acts of 1844-5, p. 71, had jurisdiction to make such orders. And in suit by the purchaser of the land at the administrator's sale, to divest the title out of an adverse purchaser, the heirs of the intestate are not necessary parties.—*Garrett vs. Bicknell*, 404.

## ADMINISTRATION, continued.

4. *Land—Title claimed under administration sale—Proof as to order of sale, what necessary.*—In ejectment for land, the title to which defendant claims under an administration sale, the failure of the record of the probate court to show an order authorizing the sale, is at law a fatal defect, and incapable of being supplied by proof *aliunde*, whether it be notice, report or approval of sale, or administrator's deed. Such order has the same relation to administration sale as a judgment does to an execution sale. But where it appears that the land was sold above its appraised value and the proceeds were applied to the relief of other lands of plaintiff, evidence of these facts will create a clear equity in favor of defendant.—*Evans vs. Snyder*, 516.
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## ARBITRATION AND AWARD.

1. *Appraisement—Limitation as to time of completing—Waiver of.*—Where a party consents to an adjournment of the hearing of an appraisement until after the time fixed by the agreement for completing it, and at the adjourned session appears before the appraisers and offers testimony, the limitation as to time of finishing the appraisement is waived.—*Leonard vs. Cox*, 32.
2. *Appraisers, partiality of will authorize vacation of award.*—The partiality of appraisers will authorize the vacation of an award.—*Id.*
3. *Arbitration—Choice of third arbitrator at commencement of proceedings.*—It is well settled, that in cases of submission to arbitration providing for the selection of an umpire in the event of a disagreement of the arbitrators, they may select the umpire before they enter upon the consideration of the subjects submitted.—*Id.*
4. *Arbitration—What agreement not a submission under the statute—Pleading—Suit on appraisement improper, when—Fault not material, when.*—A written agreement to surrender a leasehold at a certain time, for such sum as appraisers chosen for that purpose may determine it to be worth, is not a submission to arbitration within the meaning of the statute, but merely a contract for sale, the price to be fixed by third persons. And suit is properly brought on the contract of sale for the price so claimed, and not on the appraisement itself. And although the plaintiff declares specially on the appraisement, where no objection is made on that score, and the value of the property is fairly ascertained *aliunde* by the jury, and is found to correspond very nearly with the appraisement, and substantial justice is done, the infirmity of the pleadings will not work a reversal of the cause.—*Id.*

## ATTACHMENT.

1. *Officer—Levy on property of B. on suit against A.—Bond, liability on, etc.*—If on a writ of attachment against A., an officer levies on the property of B. he

## ATTACHMENT. continued.

is guilty of official misconduct for which he and his sureties are liable, at the suit of B. on his official bond; and it would clearly be his duty to return the property to B. although it were taken from the possession of A.—*State ex rel. Gates vs. Fitzpatrick*, 185.

2. *Bailment—Attachment, dissolution of sale of property in hands of bailee, effect of.*—Upon the dissolution of an attachment the officer becomes the bailee for the defendant (if he is the owner) not by contract but by operation of law.

In case of bailment by contract, a transfer by the bailor of the property and the right of possession, operates to transfer not merely the right of possession but the goods themselves, and thereafter the vendor's bailee becomes the bailee of the vendee, and the possession of the bailee is that of the purchaser. (*Williams vs. Gray*, 39 Mo. 205.)—*Id.*

3. *Attachment—Sale of property subject to—On dismissal of suit officer should turn property over to whom—Official bonds, liability on.*—After the dismissal of an attachment it is the duty of the officer at his peril to turn the property over to the true owner, who is *prima facie* the defendant in the attachment. But where pending the attachment, and subject thereto, defendant sells the property and the officer is notified of that fact, he must on dismissal of the suit deliver it to the vendee; and in such case he is not estopped from showing in a suit by the vendor that the latter had parted with his interest, even though the property had been seized while in the vendor's possession. And on the other hand, if after dismissal he return the property to the vendor so that the same is lost to the vendee, he will be liable therefor on his official bond.—*Id.*

4. *Bond—Judgment for amount assessed instead of judgment on penalty—Effect of practice—Supreme Court.*—Judgment for the amount assessed in an action on a bond, instead of judgment for its penalty with special execution for the amount assessed, will operate a reversal on appeal.—*Id.*

## ATTORNEY AT LAW.

1. *Attorney—Power to compromise debt—Subsequent ratification.*—An attorney has no authority growing merely out of his employment to compromise a debt. And if the client accepts the fruits of the compromise, with knowledge of it, and without dissent, that may amount to a ratification, and such ratification would be equal to a previous authority.—*Semple, Birge & Co. vs. Atkinson*, 504.

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**B.**

## BAILMENT.

1. *Bailment—Hire of horse—Receipt in full of demands, what items embraced in—Payment of price of hire—Waiver of damages.*—In action for the value of a horse hired by defendant and alleged to have been killed by his overdriving him, where it appeared that after the death of the horse, plaintiff presented to defendant an account containing among other items one for the hire of the horse, but no claim of damages for his loss, which account defendant paid, taking a receipt "in full of all demands;" held that such receipt would

**BAILMENT, continued.**

not bar a recovery. Evidence *aliunde* may be introduced showing that the damage for loss of the horse was not embraced in the settlement. And a charge by plaintiff for hire of the horse is no waiver of a claim for damages, nor is payment of such charge a settlement of that claim.—*Bigbee vs. Coombs*, 529.

See Attachment, 2, 3; Common Carriers.

**BANKS AND BANKING.**

1. *Certificate of deposit, interest on, after due—Judgment of affirmance with damages.*—Where a certificate of deposit by its terms matures six months after date, and is to bear six per cent. interest from date, it will continue to bear the same rate of interest until paid. And where a bank brings up a plain case like this, the judgment will be affirmed with ten per cent. damages.—*Cordell vs. First Natl. Bk. of Kansas City*, 600.

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**BILLS AND NOTES.**

1. *Bills of exchange—Ten per cent. damages, when allowable without protest.*—*Semble*, that in suit on a bill of exchange expressing value received and drawn without the State by plaintiff, the holder, on defendant—who is acceptor—within this State, damages at ten per cent. are allowable notwithstanding want of protest. (Wagn. Stat., 215, 216, § 8.)—*Phillips v. Evans*, 17.
2. *Prom. note—Endorser treated as prima facie maker, when—Accommodation endorsement, agreement as to—Notice of to holder—Notarial protest—Effect of.*—Parties whose names are written on the back of a note before delivery to the payee are *prima facie* liable as makers. And the holder before maturity for value is not bound by an agreement between them and the payee, of which he had no knowledge at the time of transfer to himself, that they should be held only as accommodation endorsers. And the certificate of the notary of a bank to which the note had been given for collection without instructions, that he demanded payment of them and afterwards gave them notice of their own refusal to pay, is wholly inadmissible as evidence to charge the holder with notice of such agreement.—*Chaffe v. The Memphis, Carthage & Northwestern R. R. Co., et al.*, 193.
3. *Bills and notes—Negotiability—Indorsement—Assignor, liability.*—An instrument in the following form is not a negotiable instrument.  
 “\$100. Neosho, Mo., Aug. 29, 1874, \_\_\_\_\_ after date \_\_\_\_\_ promise to pay to the order of \_\_\_\_\_ dollars for value received, negotiable and payable, without defalcation or discount, with ten per cent. interest thereon from maturity, till paid; and if said interest shall remain unpaid for the time of one year from the maturity of this note, then the same to become as principal, and to bear the same rate of interest as principal, and to be compounded annually; and we do each and severally waive any and all exemptions under and by virtue of any execution, exemption, homestead or stay laws of the State of Missouri, or that of any other State; and we do each further promise and agree to pay a reasonable attorney's fee for the bringing suit in collection of this note, if suit thereon be brought or collection thereof be enforced after the same shall become due, payable at the Newton County Bank of Samstag & Stein.” (See *First Natl. Bank of Trenton vs. Gav.* 63 Mo 33.)

## BILLS AND NOTES, continued.

And the indorsement by the payee simply makes him liable as assignor to pay after the exercise of due diligence by the holder, and failure to collect from the maker after suit, or in case of the insolvency or non-residence of the maker, so that a suit would have been unavailing.—*Samstag, et al. v. Conley, et al.*, 476.

See Administration, 1, 2; Surety, 2, 3.

BOND; See Attachment, 2, 3, 4; Equity, 3; Limitations, 1; Officers, 8; Surety, 1.

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## COMMON CARRIERS.

1. *Practice, civil—Instructions—Evidence—An instruction not based on evidence is properly refused—Carriers—Mandatory—Declarations—What constitute—Measure of damages—Negligence—Interest.*

1st. A carrier who transports property gratuitously is liable for injuries thereto only in cases of gross negligence, but a declaration by him that he will "charge little if anything" does not constitute him a mandatory so as to bring him within that rule, even though his statement be coupled with an unexpressed intention to transport without hire.

2d. In the absence of an agreement a promise to pay a reasonable sum for freightage arises by implication.

3d. In case of loss or destruction the carrier is bound for the value of the property at the time of contemplated delivery, less freightage, if unpaid. But in the absence of proof as to amount of freightage, no deduction should be made therefor.

4th. Interest may be charged in case of gross negligence. In the absence of negligence, interest may be withheld.—*Gray v. The Missouri River Packet Co.*, 47.

2. *Common carrier—Action against for failure to deliver stock—Special contract—Common law obligation and liability of carrier—Petition before justice, what sufficient.*—A common carrier cannot, by a special contract relating to the transportation of stock, defeat an action in *tort* for their own delivery, based on his common law obligation to use due diligence in transportation of the same. The liability of defendant in such case does not arise upon contract, but in spite of it. And in such case plaintiff's petition before a justice, stating the delivery of the stock to the carrier, his undertaking to transport and failure to deliver them at their destination, their value and the loss, although irregular, is substantially in the form of an action *ex delicto* founded in *tort*.—*Clark v. St. L., K. C. & N. R. R. Co.*, 440.

3. *Carriers—Action against—Declaration—Special contract need not be set out in, when.*—In cases where there is a special contract with the carrier, by which the common law liability is restricted, and the action is in form *ex contractu*, it seems that the special contract must be set out in the declaration;

## COMMON CARRIERS, continued.

but where the action is in *tort* for the breach of a duty or obligation imposed by law, it is unnecessary to notice the special contract, although it may be under seal.—Id.

4. *Common carrier—Transportation of stock—Negligence—Burden of proof on owner, when.*—Where the owner contracts to load and unload his stock, and to take charge of them during their transportation, and does in fact do so, the burden of proof, when the company is charged with negligence, for the loss or injury to the stock, is upon the owner.—Id.

CONDEMNATION OF LAND; See Railroads, 8.

CONFISCATION; See War Power of the United States.

## CONSPIRACY.

1. *Conspiracy—Declarations of confederates when competent as against each other.*—Declarations of confederates against each other are only admissible as part of the *res gesta*, and unless they accompany acts done in the prosecution of the common object, they are inadmissible. When that object is at an end whether by accomplishment or abandonment, no one of the confederates is permitted by any subsequent act or declaration of his own to affect the others.—*State v. Duncan*, 262.
2. *Combination for unlawful purpose—Responsibility of member for past acts—Relation.*—One who joins a band of persons combined for an unlawful purpose does not thereby become responsible criminally for acts done by other members of the combination prior to his becoming a member.—Id.

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1. *Practice, civil—Contract—Omission of seal.—Prayer for reformation—Demurrer.*—An instrument in the form of a bond is good as a contract and constitutes a good cause of action at common law although without seal. And no necessity existing for its reformation to make it such, the fact that the plaintiff's petition prays for reformation of the instrument, so as to make it a specialty, will not warrant a demurrer.—*Saline Co. v. Suppington*, 72.
2. *Contract—Part fulfilment—Measure of damages.*—Where by the terms of the contract for the sale of certain saw logs; they were to be "received and paid for when as much as 50,000 feet were ready," if they received less than that number they would be liable on the *quantum meruit* for what they got, taking the contract price as their value, if the agreement had been carried out and making proper allowance for the difference between that and the value of the logs as furnished.—*Rickey v. Zeppenfeldt*, 277.
3. *Sale—Title passes without transfer of possession, when.*—A sale without delivery or possession taken by the vendee passes the title, if the property is of such a nature and so situated that his possession would be impracticable or inconvenient. So where the article though bought in general terms from a large number of the same description, is afterwards selected and set apart with the assent of the parties as the thing purchased.—Id.
4. *Contracts—Consideration moving to third person, etc.*—It is now the settled law in this State and elsewhere, that a promise made to one, for a valuable



## CONTRACTS, continued.

consideration, moving from him to another who agrees to pay a sum of money to a third person, will support an action by the latter.—*Cress v. Blodgett*, 449.

5. *Vendor and purchaser—Dependent and independent covenants—Consideration moving to third party.*—Where A. covenanted to convey to B. by deed of warranty a tract of land, in consideration that B. should assume a mortgage on the land and give his note for a balance due from A. to C., and B. permits the property to be sold under the mortgage to a third party, it is not necessary, in order to entitle C. to recover on his note against B., to deliver to the latter a deed to the land from A. The payment by B. of the mortgage note and discharge thereby of the liens were a condition precedent to his right to the deed.—*Id.*

6. *Instrument, construction of—Intention of parties—Attendant circumstances.*—That the intention of the parties in signing an instrument is, if possible, to be adopted; which intention is to be gathered, if necessary, from the light of surrounding circumstances, and that construction is to prevail, which will make the instrument efficacious, instead of the opposite.—*State to use Watkins v. Miserez*, 596.

See Administration, 3; Banks and Banking, 1; Bills and Notes; Common Carriers, 1, 2, 3, 4; Conveyances; Equity, 1, 2; Fraud, 1, 2, 3; Husband and Wife, 1; Insurance, Life; Judgment, 3; Kansas, City of, 1, 3; Practice, civil—Trial, 4; Special Taxes, 1; Surety; War Power of the United States; Warranty; Wills, 5.

## CONVEYANCES.

1. *Recidence—Certificate of acknowledgment of clerk of circuit court—Record copy—Private seal—Omission of.*—Where, as appears from a record copy thereof, the body of a certificate of acknowledgment made by the clerk of a circuit court contains the statement that, there being no seal of the court, the private seal of the clerk is affixed, the presumption arises that the seal was attached thereto, although no written scroll or seal is copied on the record.—*Norfleet v. Russell, et al.*, 176.
2. *Deeds—Covenant of future assurance—After-acquired title.*—Where it distinctly appears on the face of a deed that the intent of the grantor is to convey a fee simple estate, and the instrument contains covenants of future assurance of title, it will convey such as the grantor may afterwards acquire.—*Id.*
3. *Ambiguity, latent will not render deed inadmissible.*—The omission in a deed to designate the county in which land lies will not render the deed inadmissible.—*Id.*
4. *Deed—Acknowledgment—Date of—Subsequent to that of record—Effect of.*—Although the acknowledgment of a deed bear date subsequent to that of the record, notice will nevertheless be imparted from the date of the acknowledgment.—*Id.*
5. *Action—Deed—Suit on subsequent to date of.*—Plaintiff cannot recover on a deed executed after the commencement of his suit.—*Id.*
6. *Conveyances—"Grant, bargain and sell"—Covenant implied by words, made on behalf of those holding subordinately and not adversely—What holding adverse.*—B having purchased of A. certain land without at the time receiving a deed, took possession and made lasting improvements; and having in-

## CONVEYANCES, continued.

cumbered the land, subsequently sold it to C.; at date of which sale, on request of B. and with consent of C., and solely for their convenience, A. made to C. a deed in fee which contained the usual words "grant, bargain and sell." C. having been compelled to pay off the mortgage sued A. on his covenant against incumbrances implied in the above words. *Held*, that "all claiming under him" construed by the statute (Wagn. Stat., 274, § 8) to be covenanted on behalf of by the grantor in the words "grant, bargain and sell," referred to those holding subordinately and not adversely to the grantor; that B. although deriving title to the land from A. did not claim under him, but being in equity the owner of the land and entitled to a deed from A. held adversely to him (See *Ridgeway vs. Holliday*, 59 Mo. 444); that the intention of A. manifestly was to transfer to C. the title which he had obligated himself to make to B., and the intention and effect of his deed was not to covenant against the acts of B.—*Clore v. Graham*, 249.

7. *Conveyances—Covenant against incumbrances—Notice to and knowledge of covenantee no discharge to covenantor, when.*—The maker of a covenant against incumbrances is not relieved from liability for such as are covered by the covenant, by the constructive notice imparted by the record to the covenantee, nor by actual knowledge on his part at the date of deed.—*Id.*
8. *Ambiguity, patent—Explanation of.*—Patent ambiguity cannot be explained by extrinsic evidence.—*Bradshaw, et al. v. Bradbury*, 334.
9. *Deeds, construction of—Words not technical, how to be taken.*—In ascertaining the intent of the maker of a deed, where the words employed are not technical, they must be taken in their usual acceptation.—*Id.*
10. *Deeds—Description in by words and figures—Which shall govern.*—In deeds as well as notes, where words and figures are used to describe the same thing, and are contradictory, the description by words will govern. Thus, where a deed conveyed "lot number (142) one hundred twenty-four (124)," the lot conveyed was held to be 124, and not 142.—*Id.*

See Sales, 3; Wills, 1, 3, 4.

## CORPORATION.

1. *Practice, civil—Corporation, appearance of to suit.*—The appearance of a corporation to a suit is an admission of its corporate existence and dispenses with the necessity of establishing that fact by evidence.—*Witthouse v. Atl. & Pac. R. R. Co.*, 523.
2. *Corporations—Service of process on—Absence of chief officer, recital as to.*—The return of service of process on a corporation under the statute (Wagn. Stat. 294, §§ 26, 27), made by leaving a copy at a business office of the company, with the person having charge thereof, in order to be valid must recite that the chief officer is absent from, or cannot be found in, the county, and not merely and generally that he is absent. The proper inference from the latter recital is that he was absent from his office.—*Hoen v. Atl. & Pac. R. R. Co.*, 561.

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## CORPORATIONS MUNICIPAL.

1. *Corporations, municipal—Liability of in damages for grading of streets.*—It is the settled law of this State that a municipal corporation is not liable for damages indirectly resulting to the proprietors of lots within the corporation,

**CORPORATIONS, MUNICIPAL, continued.**

from the grading of streets or from changes in the grade, authorized by the municipality.—*Tate v. M., K. & T. R. R.*, 149.

2. *Corporations, municipal—Liability for occupation of streets by railroads.*—Where a municipal charter so allows, a railroad may be constructed on a street by permission of the municipal authorities, and neither the municipality nor the railroad company will be responsible for the inconvenience and damage resulting from such construction. But this rule applies only to a railroad constructed on the grade of the street, where the only obstruction is the passage of the trains, and not where embankments have been made above the grade, or where the street is used for side tracks or other structures for the convenience of the road.—*Id.*

See Damages 7; Kansas, City of; Officers, 7; Railroads, 1; Streets, 1.  
**COURT, CASS COUNTY COMMON PLEAS.**

1. *Constitution—Cass County Common Pleas Court "in force" under—Conviction by Probate and Criminal court of, void—Habeas corpus.*—The act of March, 1875, establishing a Probate and Criminal court in lieu of the Common Pleas court of Cass county, by its terms was not to take effect till January, 1876. The present Constitution was dated Nov. 1875. Section 3 (p. 43) of that Constitution providing that "all other courts of common pleas shall cease to exist at the expiration of the present terms of office of the several judges," embraced in its description that court; and the term of office of its judge holding at the adoption of the Constitution did not expire till 1878. *Held:*  
1st. The Common Pleas court at the time of the adoption was "in force," (Const. § 1, p. 43) and the act of March, 1875, never became operative, being repugnant to section 3, *supra*, which recognized the continued existence of the Common Pleas court.  
2d. Hence, a conviction by the Probate and Criminal court was void and of no effect. The rule that the acts of an officer *de facto* are valid, has no application where the office itself does not exist.  
3d. The prisoner was properly released for that cause on habeas corpus.—*Ex parte Snyder*, 58.

**COURT, COMMON PLEAS, SUGAR TREE TOWNSHIP, RANDOLPH COUNTY ;**  
See Practice, Criminal, 4.

**COURT, DADE PROBATE ;** See Administration, 3.

**COURT, GREENE COUNTY PROBATE AND COMMON PLEAS.**

1. *Probate and Common Pleas Court of Greene County—Circuit court has only appellate power over.*—Where a cause is appealed from the Probate and Common Pleas Court of Greene County to the circuit court of the same county, and no exceptions are taken or saved in the former court, the latter cannot review or revise anything but error patent of record. It has no jurisdiction to try the case anew. (*McCraw vs. Hubble*, 61 Mo. 107.) *Paris v. Abbott*, 145.

**COURT, ST. LOUIS COURT OF CRIMINAL CORRECTION ;** See Habeas Corpus, 3.

**COURT, UNITED STATES ;** See Removal of causes to United States Courts, 1.  
**COVENANT ;** See Conveyances, 2, 6, 7.

**CRIMINAL LAW ;** See Practice, Criminal.

**D.****DAMAGES.**

1. *Damages—Fraudulent misrepresentations—Must have effect of deceiving, when.*—To authorize damages growing out of fraudulent misrepresentations, it must appear, not only that they were designed to deceive, but, that they did in fact have that effect, and induced the party to act.—*Parker v. Marquis*, 38.
2. *Damages—Killing of stock in unfenced depot grounds.*—To entitle plaintiff; to recover against a railroad company under § 5 of the Damage Act (Wagn. Stat., 250) for the value of stock killed in open and unfenced depot grounds, he must prove negligence in defendant. Such open spaces seem to be regarded as in a measure dedicated to public use, and somewhat in the nature of public highways, and therefore within the exception of the statute. (See *Morris vs. St. L., K. C. & N. R. R.*, 58 Mo. 78.)—*Swearingen v. M., K. & T. R. R. Co.*, 73.
3. *Damages—Railroads—Defects in machinery and track—Allegata and probata.*—Where an action for damages against a railroad is grounded on an alleged defect in construction of the engine, plaintiff cannot recover for an injury resulting from a defect in the track.—*Buffington v. Atl. & Pac. R. R. Co.*, 246.
4. *R. R. Corporation act, negligence, question of, cannot be raised under.*—Under § 43 of the Railroad act (Wagn. Stat. 310-11) no recovery can be had for injuries resulting from the negligent management of the locomotive or train. For that purpose, suit must be brought under § 5 of the damage act.—*Crutchfield v. St. L., K. C. & N. R. R. Co.*, 255.
5. *Damages—Railroad law, § 43; Suit held to be brought under, when.*—Where plaintiff's petition in suit against a railroad company for injuries to stock, alleges the duty of defendant to erect and maintain fences, the breach of that duty and the prayer for double damages; and direct reference is made in the body of the petition to § 43 of the railroad law, the pleading will be treated as brought under that section, although containing the further averment that the injury was negligently done.—*Id.*
6. *Railroads—Damages—Contributory negligence—Evidence—Non-suit.*—In suit against a railroad under § 2 of the damage act (Wagn. Stat. 519-20) it appeared that the employee was run over by an express train passing at the usual hour—about seven in the evening; that the night was moonlight, but at the site of the accident, owing to a cut and curve in the road, deceased could not have been seen on the track more than two hundred and fifty yards; and there was no proof that the engineer saw him at all, or that he might with proper care have seen him; and on the other hand it was shown that deceased, for fourteen years, had lived in a house standing on the company's right of way, and presumably knew of the time of the passage of the train, and might have seen it coming in time to get off the track. *Held*, that plaintiff made out no case for a jury, and should have been non-suited.  
It is the duty of the court, when there is no evidence of negligence on the part of the company, or there is uncontradicted evidence of negligence on the part of the persons killed or injured contributing directly to the result, so to instruct the jury.—*Maher v. Atl. & Pac. R. R.*, 267.
7. *Negligence—Rate of railroad speed.*—No rate of speed in a railroad train is negligence *per se*, except where the law of the State, or of a municipal corporation authorized to do so, prescribes a limit.—*Id.*

## DAMAGES, continued.

8. *Damages—Railroad—Care of company after discovering danger—What requisite.*—To make a railroad company liable where the party injured has also been negligent, it should appear that the proximate cause of the injury was defendant's omission, after becoming aware of plaintiff's danger, to use a proper degree of care to avoid injuring him. If, on discovering him upon the track, it was impossible, with safety to the train and those on board, to stop the train in time to prevent the casualty, the company cannot be held, unless guilty of negligence beforehand which creates the impossibility.—*Id.*
9. *Damages—Railroad—Failure to fence—Point of accident, etc.*—When stock get upon the track of a R. R. Co. in consequence of the failure of the corporation to fence its track as required by statute (Wagn. Stat. § 43, 310), the road is liable, regardless of the question at what point on the track the stock was killed.—*Witthouse v. Atl. & Pac. R. R. Co.*, 523.
10. *Damages—Action by widow under § 3 of the Damage Act for killing of husband—Petition—Reference to statute.*—Section three of the Damage Act (Wagn. Stat. 520) merely causes a right of action to survive where the deceased, had he lived, might have had his action for injuries at common law. And in suit by the widow, for the death of her husband, where the petition states facts which bring the case within the provisions of that act, no reference to the act is necessary.—*White v. Maxcy*, 552.
11. *Damages—Self defense, right of, when cannot be invoked.*—The right of self defense, which justifies homicide, does not imply the right of attack. And the plea cannot avail in any case where the difficulty was induced by the act of the accused, in order to afford him an opportunity to wreak his malice.—*Id.*
12. *Civil action for homicide—Danger of bodily harm—Opinion of witness.*—In an action of damages for homicide, the question asked of defendant, whether he apprehended that deceased would inflict on him any great bodily harm, was held properly excluded. His opinion on that subject was of no importance and was not legitimate evidence. (Wagn. Stat. 446, § 4.)—*Id.*
13. *Damages, measure of.—Constable, suit on bond of.—Evidence.*—Where it is shown by the evidence, that the plaintiff had recovered a judgment, that execution issued and was levied by the constable upon property equal or exceeding in value the amount of the execution, a *prima facie* case for recovery is established.—*State to use Kelly v. Cobb, et al.*, 586.
14. *Damages, measure of.*—The measure of damages in such case is the amount of the plaintiff's recovery in the former action.—*Id.*  
See Bailment, 1; Banks and Banking, 1; Bills and Notes, 1; Common Carriers, 1; Contracts, 2; Insurance, Life, 1; Practice, civil—Appeal, 2; Practice, Supreme Court, 8; Railroads, 4, 5, 6, 7, 10, 11, 12, 13, 14; Statute, Construction of, 2, 3, 4, 5; Streets, 1.

DAMAGES, MEASURE OF; See Sales, 1, 2.

DEATH OF PARTIES; See Judgment, 1; Witnesses, 1, 2.

## DEFAULT.

1. *Attorney, neglect of.*—The neglect of an attorney is that of his client.—*Biebinger v. Taylor*, 63.
2. *Practice, civil—Default—Motion to set aside—Failure to docket case—Note—Affidavit as to usury and want of consideration, etc.*—On motion to set aside

**DEFAULT**, continued.

default on a note, defendants' affidavit merely showed that the clerk failed to docket the case, and that the attorneys could not find the papers, and it did not appear that the attorneys ever made search for them, or called on the clerk or sheriff for them, or that their production was necessary to a defense; and the evidence showed that defendants were duly served with a copy of the petition, and had ample time within which to answer; and the defense proposed to be set up was merely that plaintiffs acquired the note after maturity and without consideration, and that usurious interest was incorporated into the note. (See *Wagn. Stat.* 782, § 5.) *Held*, that the motion and affidavit were, without merit—and *a fortiori*, where such proposed defense was neither set out or alluded to in the affidavit.—*Id.*

**DELIVERY**; See *Sales*, 1.

**DESCRIPTIO, PERSONÆ**; See *Administration*, 1, 2.

**DIVORCE**.

1. *Divorce—Decree in motion to set aside—Record.*—The Supreme Court will not examine an appeal from a decree in a divorce suit where the record fails to show that a motion to set aside the decree was disposed of.—*Thomas v. Thomas* 353.

**DOWER**.

1. *Dower—Devise—Renunciation of, must be filed, when.*—Under the statute relating to dower (*Wagn. Stat.* 541, § 10) where land is devised to the wife by the will, she cannot hold her dower unless her renunciation of the devise be filed within one year after probate.—*Dougherty v. Barnes*, 159.
2. *Dower—Devise in lieu of—Renunciation of devise must be filed, when.*—The term "pass" as used in § 16 of the Dower Act (*Wagn. Stat.* p. 541) means "devise," and under the statute law of Missouri, (see §§ 15, 16) after due notice of her devise, the renunciation thereof by the widow, in order to avail in holding her dower, must be filed within twelve months from proof of the will and not later. (See *Price vs. Wood*, 43 Mo. 247; *Ewing vs. Ewing*, 44 Mo. 23; *Dougherty vs. Barnes*, *ante*, p. 159.)—*Gant v. Henly*, 162

See *Jurisdiction*, 3.

**DRAM SHOPS**; See *Practice*, criminal, 27.

**DURESS**; See *Equity*, 1, 2.

**E.**

**EJECTMENT**; See *Land and Land Titles*, 2, 7, 13.

**ELECTIONS**; See *Officers*, 3, 4, 6; *Railroads*, 1; *School and School Lands*, 2.

**ENTOMOLOGIST, STATE**.

1. *State Entomologist—Act for annual payment to, of \$3,000, unconstitutional.*—The act of March 23rd, 1870, whereby \$3,000 was appropriated annually to the State Entomologist, in so far as it contemplated payment of the annuity for more than two years after the date of the act and without a biennial appropriation, became void on the adoption of the present constitution. (See §§ 20, 24, art. iv, and § 19, art. x.) These provisions are self-executing without ancillary legislation, and refer not merely to prospective appropriations, but to those existing at the adoption of the constitution.



## ENTOMOLOGIST, STATE, continued.

The fact that schedule 6 of the constitution keeps the entomologist in office, does not affect his right to draw salary under the act.—*State ex rel. Missouri State Board of Agriculture vs. Holladay*, 526.

## EQUALIZATION, STATE BOARD OF; See Revenue, 1, 4, 5.

## EQUITY.

1. *Equity—Action to set aside conveyance for duress—Allegations, sufficiency of.*—In suit in equity to set aside a deed of plaintiff for alleged threats made to him to prosecute his brother for adultery, unless the conveyance were made, where it is not alleged that his brother was innocent of the crime, or that such prosecution would be unlawful, no foundation is laid for the relief sought. Nor will it be afforded, although it is alleged that such declarations are coupled with threats to stir up a mob and hang his brother, where plaintiff does not lay the foundation for separate relief by alleging plaintiff's belief that his failure to execute the deed would result in the carrying out of the latter threats. *Davis v. Luster*, 43.

2. *Contracts—Moral duress—Relief in equity.*—Where contracts are made in consequence of fraudulent advantage taken of the affections or sensibilities of a party, or under the influence of threats or apprehensions—although not amounting to legal duress, equity will grant relief.—*Id.*

3. *Practice, civil—Contract—Omission of seal—Prayer for reformation—Demurrer.*—An instrument in the form of a bond is good as a contract and constitutes a good cause of action at common law although without seal. And no necessity existing for its reformation to make it such, the fact that the plaintiff's petition prays for reformation of the instrument, so as to make it a specialty, will not warrant a demurrer.—*Saline County v. Sappington*, 72.

4. *Practice, civil—Prayer for relief not a distinct cause of action.*—A prayer for relief does not constitute a distinct cause of action, but only seeks a particular remedy and is not demurrable.—*Id.*

5. *Equity—Action to set aside deed of intestate for fraud and subject property to sale—Parties to suit, who are and who are not proper—Bill—Allegations showing equity—Demurrer.*

In proceedings by the creditor of an estate to subject to the payment of his debts, land alleged to have been conveyed away by the intestate in fraud of his creditors, neither the administrator nor the other creditors, nor the fraudulent grantees of the land who have parted with their interest are proper parties. But the grantees who have not so conveyed and who claim the property must be joined. And where a grantee is a married woman her husband should be made party. (*Wagn. Stat.* 1001, § 8.)—*Jackman v. Robinson*, 289.

6. In such suit the petition alleging that judgment has been obtained on plaintiff's demand against the estate, that the judgment is unpaid and the estate wholly insolvent, is not demurrable as showing a legal remedy. On the other hand the proceeding begun by him is plaintiff's only remedy.—*Id.*

See Execution, 3; Fraud; Husband and Wife, 1, 2; Judgment, 3; Land and Land Titles, 9-12; Process, 2; Railroads, 8; School and School Lands, 3.

ESTOPPEL; See Land and Land Titles, 12.

## EVIDENCE.

1. *Evidence—Value of property—Opinion of witness.*—In cases involving the value of property, the opinion of witnesses familiar therewith may be received.—*Tate v. M., K. & T. R. R. Co.*, 149.
2. *Jury—Confession—Evidence.*—It is error to leave the question whether a confession is voluntary or not to the jury, more especially when the case is one creating public excitement and where there is a strong feeling in the community against the accused.—*State v. Duncan*, 262.
3. *Conspiracy—Declaration of confederates when competent against each other.*—Declarations of confederates against each other are only admissible as part of the *res gestæ*, and unless they accompany acts done in the prosecution of the common object, they are inadmissible. When that object is at an end, whether by accomplishment or abandonment, no one of the confederates is permitted by any subsequent act or declaration of his own to affect the others.—*Id.*
4. *Evidence—Jury—Falsus in uno, etc.*—When the jury believe that a witness has knowingly testified falsely to any material fact in the trial, they are at liberty to reject his entire testimony.—*State v. Orr*, 339.
5. *Evidence—Falsus in uno, etc.*—An instruction which tells a jury that they may disregard the testimony of a witness who has testified falsely in any particular, without describing such testimony as wilfully or intentionally false, is improper; but the giving of such instruction will not operate a reversal, where it does not appear to have wrought injury to the appellant.—*State v. Brown*, 367.
6. *Appeal without merit—Damages.*—Where an appeal is without merit, judgment will be affirmed with ten per cent damages.—*Rose v. Cobb*, 464.
7. *Instructions—Refusal of.*—Instructions substantially embodied in others given may be properly refused.—*Whithouse v. Pac. R. R. Co.*, 523.
8. *Evidence—Falsus in uno—Instruction, etc.*—A jury may disregard the testimony of any witness whom they believe to have wilfully sworn falsely concerning any material fact in issue. But an instruction to that effect should not be given except where some witness has given false testimony; and on that point the trial court is best qualified to pass.—*White v. Maxey*, 552.
9. *Evidence of marriage, what sufficient.*—The testimony of a widow that the deceased was her husband, and that they had lived together seventeen years, was held amply sufficient to establish the fact of their marriage.—*Id.*  
 See Administration, 4; Bailment, 1; Conveyance, 8, 9; Corporations, 1; Damages, 6, 12; Execution, 3; Fraud, 5; Husband and Wife, 2; Land and Land Titles, 6, 7, 8, 9, 13; Officers, 8; Practice, civil—Trial, 4, 7, 11; Practice, criminal, 5, 10, 13, 16, 17, 18, 19, 21, 22, 26, 29, 30, 34, 35, 44, 45, 46, 47; Practice, Supreme Court, 2, 5; Replevin, 1; Revenue, 4, 5; Special Taxes, 1; Streets, 1; Surety, 2; Wills, 1; Witnesses.

EXCEPTIONS, BILL OF; See Practice, civil—Appeal, 1.

## EXECUTION.

1. *Executions—Two issued on same judgment and returnable to same term—Costs—Reversal.*—The mere fact that two executions are issued on the same judgment and returnable to the same term, where one is in fact returned before the issue of the other, and no harm will result save the costs of the additional issue, will furnish no ground for reversal.—*Phillips vs. Evans*, 17.

**EXECUTION, continued.**

2. *Practice, Supreme Court—Levy, mistake in—Appeal—Corrections—Reversal unnecessary, when.*—Where motion was made to quash the levy of an execution for the reason that the ground described therein was part only of that occupied by a building, and that sale under it would entail a ruinous sacrifice, and the case went up by appeal, it was held that as no sale had taken place under the levy, the circuit court should simply be directed to correct the error of description and that the cause need not be remanded for that purpose.—*Id.*
3. *Execution sale, motion to set aside on ground of fraud—Review of evidence—"Equity side" of court—Practice—Abolition of old distinction in forms; but retention of matter of substance in pleadings.*—On motion to set aside an execution sale, on the ground of fraud; *Held*, 1st, that this court would not review the evidence, this being a *law case*, notwithstanding the allegation of *fraud*. 2d, That the only way to reach the "*equity side*" of the court, is not by *motion*, but by appropriate procedure; the distinctive characteristic of the two systems, Law and Equity, still remaining as well pronounced as before. *Sem. ble*, that mere inadequacy of price, is insufficient ground for setting aside sale.—*Holden vs. Vaughan*, 588.

See Attachment, 4; Justices' Courts, 1; Mortgages and Deeds of Trust, 3; Partnership, 1.

**EXEMPTION**; See Partnership, 1.

**EXHIBIT**; See Practice civil—Pleading, 1.

**F.**

**FENCES**; See Damages, 2, 5.

**FORCIBLE ENTRY AND DETAINER**; See Land and Land Titles, 5.

**FORGERY**; See Surety, 1.

**FRAUD.**

1. *Contract—Fraud—Election of party to rescind or stand by and sue for damages.*—A party defrauded in a contract may stand by it, even after he discovers the fraud, and recover damages resulting from the fraud, or he may rescind the contract and recover back what he has paid or sold.—*Parker vs. Marquis*, 38.
2. *Contract, executory—Performance of after discovery of fraud—Recovery of damages.*—Where a party has been defrauded by another in making an executory contract, a performance of it on his part, with a knowledge acquired subsequently to the making, and previous to the performance, will not bar him of any remedy for the recovery of damage.—*Id.*
3. *Contract—Fraudulent concealment—Measure of damages.*—Where as compensation for feeding and caring for certain sheep for a year, the keeper was to receive part of the wool and increase, and the fact was fraudulently concealed from him that a portion of the sheep were diseased, he was held entitled as damages to the cost in time and expense of caring for them, including that superinduced by the disease, less his profits under the contract.—*Id.*
4. *Damages—Fraudulent misrepresentations—Must have effect of deceiving, when.*—To authorize damages growing out of fraudulent misrepresentations, it must appear, not only that they were designed to deceive, but, that they did in fact have that effect, and induced the party to act.—*Id.*

FRAUD, continued.

5. *Fraudulent representation—Action for—What scienter necessary to be shown—Testimony as to intent may be rejected, when.*—In order to sustain an action, based on deceit or fraudulent misrepresentations, it must be shown that the party making them believed or had good reason to believe at the time, that they were false, or intended to convey the impression that he had actual knowledge of their truth, whereas he was aware in fact that he had no such knowledge, and it must appear that the other party relied upon them and was deceived by them to his injury.

In such suit where the fraudulent intent of the party is sufficiently made to appear from the facts in the case, his testimony that he had no such intent is properly excluded.—*Dulaney vs. Rogers*, 201.

See Equity, 5; Execution, 3; Land and Land Titles, 9.

FRAUD, STATUTE OF; See Land and Land Titles, 2.

FRAUDULENT MISREPRESENTATIONS; See Fraud.

## G.

GRADING; See Corporations, Municipal, 1; Kansas, City of, 1.

## H.

### HABEAS CORPUS.

1. *Habeas corpus—Commitment by court having no jurisdiction.*—Where a prisoner has been committed by a court having absolutely no jurisdiction, the validity of the commitment may be inquired into on *habeas corpus*.—*Ex parte Snyder*, 58.
2. *Habeas corpus—Discharge of prisoner by circuit court—Re-arrest under same charge unlawful.*—Under the statute law of this State, where a prisoner is brought before the judge of a circuit court having authority to issue the writ, on petition for *habeas corpus*, and the judge acquires jurisdiction of the person and the subject matter, his discharge of the prisoner, whether the decision be erroneous or not, being in favor of personal liberty, is final and conclusive and not subject to appeal; and the prisoner cannot be again arrested and committed on the same charge. And the rule applies to circuit courts of St. Louis county in like manner as to other circuit courts.—*Ex parte Jilx*, 205.
3. *Habeas corpus—St. Louis Court of Criminal Correction—Sentence by, and appeal to St. Louis Court of Appeals—Jurisdiction of Supreme Court to grant writ.*—Where a prisoner under sentence in the St. Louis court of Criminal Correction is discharged on *habeas corpus*, and re-arrested for the same offense, the fact that an appeal from the original sentence is pending in the St. Louis Court of Appeals, and that from that tribunal no appeal will lie in such case to the Supreme Court, will not prevent the latter court under an application for *habeas corpus*, from discharging the prisoner from his re-arrest. In such proceeding, the Supreme court exercises not an appellate but an original jurisdiction conferred by the constitution.—*Id.*
4. *Habeas corpus—Discharge—Re-arrest—Supreme Court, jurisdiction of—Re-arrest adjudicata.*—Where the prisoner having been once discharged by the lower court on writ of *habeas corpus* has been re-arrested for the same offense, and

**HABEAS CORPUS**, continued.

remanded to the same custody, the case is rendered *res adjudicata* by the first discharge. The Supreme Court has no appellate jurisdiction. And in case of, such arrest, the Supreme Court may grant *habeas corpus*.—**PER HENRY, J.**, concurring.—**Id.**

**HOMESTEAD.**

1. *Homestead exemption, claim for as against debt—Homestead deed.*—A claim for homestead exemption, in order to avail against a debt, must rest upon a deed executed anterior to the creation of the debt. (Wagn. Stat. 698, § 7.)—**Lincoln vs. Rowe**, 138.

**HOMICIDE**; See Practice, criminal.

**HUSBAND AND WIFE.**

1. *Wife's note—Action to subject separate estate to the payment of—Judgment before justice.*—In an action to subject a married woman's separate estate to the payment of a note signed by herself and husband, the latter being totally insolvent, it is immaterial that judgment has been rendered thereon against herself and husband, before a justice of the peace.—**Lincoln vs. Rowe**, 138.
2. *Husband and wife—Mortgage on property of wife to secure husband's debts—Wife's equity to compel creditors to resort to other property of husband—Wife's right to testify, etc.*—Where a deed of trust is given by the husband and wife jointly on land of the latter to secure a debt of the husband, she occupies the position of surety toward him, and like any other surety may compel a creditor of the husband holding a mortgage on other property of his to resort thereto in the first instance before subjecting her property to the payment of his debts; and *a fortiori* she has that right when the creditor has no such security; and her equity is unaffected by the fact that her land is not owned by her as a separate estate. And in such suit being the real party in interest she is competent to testify.—**Wilcox vs. Todd**, 388.

See Damages, 10; Dower; Equity, 5; Evidence, 7; Insurance, Life, 1; Trusts and Trustees, 1.

**L**

**INDICTMENT**; See Practice, criminal, 1.

**INDORSEMENT**; See Bills and Notes, 2, 3.

**INJUNCTION**; See Schools and School Lands, 3; Railroads, 8.

**INSANITY**; See Practice, criminal, 51.

**INSTRUCTIONS**; See Malicious Prosecution, 2; Practice, civil—Trial; Practice criminal, 2, 6, 11, 18, 19, 20, 41, 43, 45; Railroads, 5, 11; Replevin, 1.

**INSURANCE, LIFE.**

1. *Life Insurance—Refusal to pay annual premium—Action against company for breach of contract—Intercourse of States, prohibition of, by proclamation of August 16th, 1861—Damages, measure of, how determined—Married women—Statute of limitation.*—Where the life of a citizen of Virginia was insured in a Connecticut company, and, after receiving the annual premium for a number of years, in May, 1861, the company refused to take a further payment thereof, it was held, that, upon the death of the assured, an action would lie on behalf of the beneficiary against the company, for dissolving its contract by such refusal; that non-intercourse between the States could not be pleaded as justi-

**INSURANCE, LIFE, continued.**

ying the non-payment, inasmuch as the prohibition of such intercourse did not date till August 16th, 1861, when President Lincoln issued his proclamation, pursuant to the Act of Congress of July 13th; and that the measure of damages would be the value of the policy at the date of its dissolution—which value might be determined by the opinion of actuaries—with interest on the amount at six per cent.

In such case, where the agent of the company and the beneficiary resided within the limits covered by the proclamation when the cause of action accrued, the period of the war would not curtail the running of the statute.

But if the beneficiary were a married woman when it accrued, the statute would not run during her coverture.—*Smith vs. Charter Oak Life Ins. Co.*, 330.

**INTEREST**; See Banks and Banking, 1; Common Carriers, 1; Railroads, 14.

**J.**

**JEOPAILS**; See Judgment, 2; Practice, criminal, 37, 38, 39, 49.

**JUDGE**; See Officers, 1, 2, 3, 4, 6.

**JUDGMENT.**

1. *Is judgment not set aside for error, dehors the record, when.*—A judgment may be set aside at any time within three years from date of its rendition for irregularity patent of record, but not after lapse of the term for matter *dehors* the record, as, on the ground that defendant was dead at the commencement of the action.—*Phillips, et al., v. Evans, et al.*, 17.

2. *Judgment—Remittitur—Informality in—Reversal—Jeofails, stat. of.*—A mere informality in the remittitur by the lower court of an excess in the amount of judgment will not authorize a reversal of the cause. The lower court will on motion cause the formal entry to be made without a remandment for that purpose. (*Wagn. Stat.*, 1034, § 6).—*Id.*

3. *Equity—Injunction—Judgment—Cotemporaneous agreement as to satisfaction by payment of a less amount—Co-defendants, release of part.*—Where in a litigated case one of three co-defendants made default, and the other two consented to a judgment against all three, for a sum agreed upon as fixing the amount of plaintiff's damages, upon the condition that they should be released upon payment of their two-thirds of the amount: *Held*, that this agreement would not prevent the enforcement against them of the remainder of the judgment, and that such a state of facts would not authorize equity to interfere by injunction to prevent its collection from them.—*Knight v. Cherry*, 513.

See Administration, 5; Attachment, 4; Justices' Courts, 2; Mechanics' Lien, 5; Mortgages and Deeds of Trust, 3; Practice, civil—Pleading, 2; Process, 4.

**JURISDICTION.**

1. *Judgment—Jurisdiction, want of, how shown.*—Jurisdiction must be shown by the whole record, and where it appears from it that the court had no jurisdiction, either over the person or subject matter, the judgment rendered is void. But from the simple judgment entry the conclusion cannot be drawn that the court had no jurisdiction.—*Brown v. Woody, Adm'r, etc.*, 547.

2. *Jurisdiction over person and subject matter.*—Jurisdiction over the subject matter cannot be conferred by consent, but jurisdiction over the person may.—*Id.*



**JURISDICTION, continued.**

3. *Dower*—*Suit to enforce, where brought*.—Suit to enforce claim for dower can be brought only in the county where the land is situated.—*Id.*

See Administration, 3; Court, Cass Co., Common Pleas, 1; Court, Greene County, Probate and Common Pleas; Habeas Corpus, 2, 3, 4; Removal of Causes to United States Courts.

- JURY**; See Evidence, 2; Practice, civil—Trials, 11; Practice, criminal, 25, 30, 37, 38, 48; Quo Warranto, 1; Railroads, 1.

**JUSTICES' COURTS.**

1. *Justices of the peace—Execution—Private person not empowered to levy*.—Since the revision of 1865 (see Gen. Stat. 1865, ch. 178, p. 702, § 20), a justice of the peace cannot empower a private person to execute a final process. The "chapter" (ch. 178) referred to by § 20, treats only of ordinary process. The division into chapters in the last edition (Wagn. Stat. ch. 82) has not the force of legislative enactment.—*Huff v. Alsap, et al.*, 51.

2. *Justice of peace—Judgment—Motion to set aside computation of time*.—In computing the ten days' time within which a motion to set aside a default before a justice of the peace may be made (Wagn. Stat., 847, § 2), the first day after the rendition of the judgment should be excluded and the last included. Thus the judgment being rendered Oct. 28th, motion filed Nov. 7th was held to be in time.—*Reynolds v. M., K. & T. Rly. Co.*, 70.

See Common Carrier, 2; Husband and Wife, 1; Trespass, 1; Warranty, 1.

**JUSTICE OF THE PEACE.**

1. *Justice of the peace—Constable, suit against for fees—Form of action*.—Under section 24 (Wagn. Stat. 845), a justice of the peace may proceed in his own name against a constable and his sureties, for fees collected by such constable, and not paid over as required by law; and under § 26 it is clearly open to such a claimant to proceed in that way, or institute a suit in a more formal manner upon the constable's bond; and if the latter course is taken the action must be in the name of the State.—*Rose v. Cobb, et al.*, 464.

**K.**

**KANSAS CITY OF.**

1. *Kansas City—Act of March 16, 1870—Special tax bills—Grading sidewalks—Wrong computation and apportionment of costs—Rule as to plaintiff's recovery and the amount*.—Section 25 of an act amending the city charter of Kansas City, approved March 16, 1870, and giving the city council power to grade sidewalks, and tax the costs, issue tax bills, etc., provided that "nothing in this section should be so construed as to prevent any defendant from pleading in reduction of the bill any mistake or error in the amount thereof, or that the work therein mentioned was not done in a workmanlike manner."

In suit on a special tax bill for grading a sidewalk when in Kansas City under said act it appeared that the work was done under a contract for grading both sides of the street; that the cost of grading the side on which the ground sought to be charged was situated, was greater than that of the opposite side of the street, but the aggregate cost of the whole work was computed and defendant taxed according to his proportion of the entire frontage of both sides, held, that on proof of these facts by defendant the suit should not be dismissed;

**KANSAS CITY OF, continued.**

but if it could be shown how much of the entire cost was properly chargeable to defendant, plaintiff might recover that amount.—*The First National Bank of Kansas City v. Nelson*, 418.

2. *Mayor—Marshal—Appointment of officer—Commission of—Evidence of what.*—Where a city ordinance authorizes the appointment of an officer by the mayor and marshal, his commission, signed by the mayor, is presumptive evidence of the concurrence of the marshal in his appointment.—*Westberg v. The City of Kansas*, 493.

3. *Municipality—Police officer—Removal of by Mayor—Claim for subsequent salary—Vested rights—Contract, etc.*—In suit by a policeman against the City of Kansas, for suspending and dismissing him from employment, and for the remainder of his salary thereafter unpaid, it appeared that, by its charter, the common council had power by ordinance (not to appoint but) to provide for the appointment of police officers; that the mayor was authorized to suspend, and, with the consent of the common council, to remove any officer, etc. On receipt of a communication from the mayor suspending an officer, the only action required of the council was to file the same. The records of the council showed that plaintiff was nominated as police officer by the mayor and confirmed by the city council; that a message was afterward received from him suspending plaintiff from his office on the police force, and recommending his removal therefrom for the unnecessary shooting of A. B. On the message was endorsed "received and action of the mayor confirmed."

"D. G., Clerk."

*Held*, that the manifest intent of the mayor was to permanently remove the officer, and that the approval of the city council, through its clerk, had reference to such purpose and not merely to a suspension from office; but even were the plaintiff only suspended from office, that he was not entitled—as against the city—to recover a salary during the period for which he was suspended, since plaintiff had no vested right in his office; nor had he had any contract with the city for his position, and if he had, the city had a right to sever it for misconduct.—*Id.*

**L.****LAND AND LAND TITLES.**

1. *Land titles—Possession defeated by prior possession with claim after.*—Where plaintiff rests his claim on naked possession, a prior possession in defendant, where the fee is claimed in connection with it, will be sufficient to defeat him.—*Norfleet v. Russell*, 178.

2. *Land and land titles—Unascertained boundaries—Agreement as to mode of establishing—Ejectment—Statute of frauds, etc.*—When the proprietors of contiguous estates, the boundaries of which are indefinite and unascertained, agree upon the line dividing their estates, the calls in their respective deeds fasten themselves upon the property to which they are thus applied, and the title passed by the conveyances covers and includes every part of the property so identified as being comprehended within the description contained in the grant. Such boundary, thus agreed upon, is to be considered the true one, and each proprietor becomes the legal owner of the land called for in his deed,

## LAND AND LAND TITLES, continued.

- up to such boundary. Such agreements are not within the statute of frauds, and ejectment may be maintained for all the land included within the calls of the deed, as located and determined by the agreement of the parties fixing the boundary.—*Turner v. Baker*, 218.
3. *Lands and land titles—Coterminous proprietors—Dividing line, parol agreement changing location of—Statute of frauds.*—When the location of the true boundary dividing their estates is known to the coterminous proprietors and they attempt, for mutual convenience, or other sufficient reason, to transfer land from one to the other, by a parol agreement changing the location of such boundary, the statute of frauds will inflexibly apply.—*Id.*
  4. *Boundary line, long acquiescence in agreement as to line may be inferred from when.*—Long acquiescence in the location of a boundary line, together with the acts and declarations of the parties treating the same as the true boundary, will authorize a jury to infer an agreement, between the parties, establishing such boundary.—*Id.*
  5. *Forcible entry and detainer—Final judgment in—Relation, doctrine of.*—If A. being the true owner of a tract of land be disseized, and B., in an action of forcible entry and detainer against the disseizor, recover judgment against him, such judgment even when executed by a writ *habere facias possessionem*, will not relate to the institution of the suit so as to make the adverse possession of the disseizor, during the intervening time, the adverse possession of B. as against A. When premises are wholly vacant, the adverse possession follows the true title.—*Id.*
  6. *Practice civil—Adverse possession—Instruction as to improper, when.*—An instruction is improper which leaves to the jury to determine the question what acts of ownership will amount to adverse possession.—*Id.*
  7. *Ejectment brought in 1856—Petition sworn to, evidence of what.*—In 1856 a petition in ejectment being required to be sworn to amounted to a solemn admission that plaintiff at date of suit was out of possession.—*Id.*
  8. *Register and Receivers at land office—Duplicate certificates of purchasers given by, prima facie evidence of purchase—Evidence in rebuttal.*—Duplicate certificates thereof given by registers and receivers of public lands are *prima facie* but not conclusive evidence of the payment of purchase money for such lands, and may be overthrown by the testimony.—*Massey, et al. v. Smith*, 347.
  9. *U. S. Land register—Purchase of public land by—Claim against one holding under by a person holding under later patent—Laches against the State—Receiver—Fraudulent combination—Equity.*—Under the statutes and the principles of law relating to that subject, United States registers in this State have no right to purchase public lands by entry at their offices, nor can laches be imputed to the State for failing to take action against persons holding under such purchaser, where nothing shows that the officers afterward connected with the land department knew anything of such purchase, nor was there anything on the records of the land office to apprise them of that fact. And on discovery of the purchase, regardless of the date of discovery, the State may annul the same, issue a new patent; and the one buying under the patent may hold regardless of the fact that he may have known of the former purchase by the register. And his rights are not affected by the fact that the land was also purchased by the receiver at the land office, where the latter purchased jointly with the Register, more espe-

## LAND AND LAND TITLES, continued.

cially when the circumstances show a fraudulent combination between the register and receiver in effecting their purchase.—*Id.*

10. *Land and land titles—Quarter section corners, how determined.*—In exterior sections having less than the full number of acres, where the quarter section corners cannot be found, the deficiency will not be divided between the quarter sections as contemplated by the statute, but must fall on the quarter directly on the township or range line. In such case the regulations of the United States Land Department must prevail over the statutes of the State. (*Knight vs. Elliott*, 57 Mo. 317.)—*Vaughn v. Tate*, 491.
11. *Land—Title claimed under administration sale—Proof as to order of sale, what necessary.*—In ejectment for land, the title to which defendant claims under an administration sale, the failure of the record of the probate court to show an order authorizing the sale, is at law a fatal defect, and incapable of being supplied by proof *aliunde*, whether it be notice, report or approval of sale, or administrator's deed. Such order has the same relation to administration sale as a judgment does to an execution sale. But where it appears that the land was sold above its appraised value and the proceeds were applied to the relief of other lands of plaintiff, evidence of these facts will create a clear equity in favor of defendant.—*Evans, et al. v. Snyder, et al.*, 516.
12. *Equitable estoppel.*—Where they stand silently by for years, while the occupant is making valuable and lasting improvements on the property, and redeeming it from the lien of the ancestor's debts, his heirs will be estopped from afterward asserting their claim.—*Id.*
13. *Ejectment—Proof required where parties look to common source of title.*—In ejectment, where plaintiff and defendant claim from a common source of title, it is sufficient for plaintiff, in the first instance, to deduce his title therefrom, without going further. To that extent, the rule, that he must recover on the strength of his own title, is departed from.—*Miller v. Hardin, et al.*, 545.  
See Conveyances; Equity, 5, 6; Mortgages and Deeds of Trust; Sales, 3; Wills.

**LARCENY**; See Practice, criminal, 15, 17.

**LICENSE**; See Practice, criminal, 27.

**LIEN, MECHANICS'**; See Mechanics' Lien.

**LIMITATIONS.**

1. *Limitations, statute of—Bond—Part payment of, by administrator of one of joint makers, effect of.*—Part payment upon a bond made by the administrator of one of the joint makers within the statutory period will prevent the running of the statute of limitations in favor of the remainder.—*The County of Vernon to use of School Fund v. Stewart*, 408.

See Insurance, Life, 1; War Power of the United States, 1.

**LIQUOR, SALE OF**; See Practice, criminal, 27.

## M.

**MALICIOUS PROSECUTION.**

1. *Malicious prosecution—Probable cause—Advice of counsel need not be to prosecute—Malice, proof of not necessary, when.*—In an action for malicious prosecution if defendant show that he was advised by counsel that plaintiff was liable to the prosecution, he need not, in order to show "probable cause," go further and show that he was advised to bring the prosecution. And when so advised of his rights, proof of malice on his part will not render him liable. —*Burris v. North*, 426.
2. *Malicious prosecution—Instruction—Proof of intent to protect family of defendant, etc.*—In suit for criminal prosecution, an instruction that in order to make out a case of probable cause, defendant was bound to show that he was actuated by a desire to protect his family, was held improperly given.—*Id.*
3. *Malicious prosecution—Action for, what essential to.*—To sustain an action for malicious prosecution, the want of probable cause and malice are both essential.—*Id.*

**MANDAMUS.**

1. *Mandamus—Application for to Supreme Court, will be refused, when.*—Except in cases of far more than ordinary magnitude and importance, applications for writs of mandamus, made in the first instance to the Supreme Court, will be refused.—*State of Missouri ex rel. Hopkins v. The County Court of Cooper County*, 170.

**MARRIAGE**; See Evidence, 7.

**MECHANICS' LIEN.**

1. *Mechanic's lien—Notice—Account not sworn to, effect of.*—Where notice of a mechanic's lien, served on defendants, states the amount of the account, and describes the property to be charged, and the account is attached and specifies the materials, and when furnished, and the notice and account are filed with the clerk of the circuit court, the law is sufficiently complied with, although the account is not sworn to.—*Hassett, et al. v. Rust, et al.*, 325.
2. *Mechanic's lien—Joint original contractors—Joinder of in suit.*—In suit by a sub-contractor on a mechanic's lien, where there are two original joint contractors, it is not necessary that plaintiffs should join both as defendants.—*Id.*
3. *Mechanic's lien, suit on—Service, how may be made.*—Service of notice of suit in the circuit court on a mechanic's lien, made by a constable, is sufficient; and, *semble*, that such service may be made by any competent witness or any officer authorized to serve writs.—*Id.*
4. *Mechanic's lien suit—Failure of petition to state when work was done, etc.—Dates set forth in account attached—Constr. Stat.*—Under the present statute (*Wagn. Stat.* 1020, § 38), where, in suit on a mechanic's lien, plaintiff files, attached to his petition, an itemized account showing when the work was done or the material was furnished, which account is referred to in the petition as a part of it, the silence of the petition on these points is not a fatal defect.—*Id.*
5. *Mechanic's lien—General judgment against owner.*—In a mechanic's lien suit a general judgment against the owner is a fatal defect.—*Id.*

**MILITARY SEIZURE**; See War Power of the United States.

**MISDEMEANOR**; See Practice, criminal.

**MORTGAGES AND DEEDS OF TRUST.**

1. *Conveyances*—"Grant, bargain and sell"—Covenant implied by words, made on behalf of those holding subordinately and not adversely—What holding adverse.—B. having purchased of A. certain land without at the time receiving a deed, took possession and made lasting improvements; and having incumbered the land, subsequently sold it to C.; at date of which sale, on request of B. and with consent of C., and solely for their convenience, A. made to C. a deed in fee which contained the usual words "grant, bargain and sell." C. having been compelled to pay off the mortgage, sued A. on his covenant against incumbrances implied in the above words. *Held*, that "all claiming under him" construed by the statute (Wagn. Stat., 274, § 8) to be covenanted on behalf of by the grantor in the words "grant, bargain and sell," referred to those holding subordinately and not adversely to the grantor; that B. although deriving title to the land from A. did not claim under him, but being in equity the owner of the land and entitled to a deed from A. held adversely to him (See *Ridgeway vs. Holliday*, 59 Mo. 444); that the intention of A. manifestly was to transfer to C. the title which he had obligated himself to make to B., and the intention and effect of his deed was not to covenant against the acts of B.—*Clore v. Graham*, 249.
2. *Conveyances*—Covenant against incumbrances—Notice to and knowledge of covenantee no discharge to covenantor, when.—The maker of a covenant against incumbrances is not relieved from liability for such as are covered by the covenant, by the constructive notice imparted by the record to the covenantee, nor by actual knowledge on his part at the date of deed.—*Id.*
3. *Mortgage*—Judgment—Pendente lite—Sales under mortgage and execution—Rights acquired under—Record—Notice.—A mortgage upon land executed after issue but before service of a petition in ejectment, does not subject the holder thereunder to the liabilities of a purchaser *pendente lite*; and a sale under such mortgage will hold as against a sale under execution on a judgment obtained in such suit, although the mortgage was recorded after judgment, provided only that the record was prior to the date of the execution. Where, however, the purchaser under the mortgage was also attorney for the plaintiff in the judgment, and the judgment was rendered with his assent and approval, he and any purchaser under the mortgage, with knowledge of the facts, would be estopped from asserting his title as against one holding under the execution sale.—*Shaw v. Padley*, 519.

See Husband & Wife, 2; Sales, 3.

**MULTIPLICITY OF SUITS**; See Practice, civil—Actions, 1.

**MURDER**· See Practice criminal.

## N.

**NEGLIGENCE**; See Common Carriers, 1, 4; Damages, 2, 6, 7, 8; Default, 1;

Railroads, 4, 6, 7, 10, 11, 12.

**NOTICE**; See Bills and Notes, 2; Conveyances, 7; Mechanics' Lien, 1, 3; Mortgages and Deeds of Trust, 3; Trusts and Trustees, 3.

**NUISANCE**; See Railroads, 3.



## O.

## OFFICERS.

1. *Circuit court—Judge of, who may be de facto—Claimant not declared to be usurper in quo warranto, when.*—Where it appears that during the entire term of office one claims to be judge of a circuit court, and acts as such, with the acquiescence of the people of the circuit, he is judge *de facto* and cannot be declared an intruder and usurper in *quo warranto*.—State *ex rel.* Att'y Gen'l v. Seny, 89.
2. *Quo warranto—Allegations as to abandonment of office—What necessary, and what insufficient.*—In *quo warranto* for usurping the office of judge, a general assertion that defendant abandoned the office and engaged in the practice of law is insufficient. The special facts showing his abandonment must be stated. And his practice of law does not in itself, of necessity, amount to an abandonment.—Id.
3. *Office of judge, vacancy in—Authority of governor to fill not judicial, but subject to review by the courts.*—Where one was chosen judge under a special election ordered by the governor, his action in directing the election to be held may be reviewed and its legality determined in a proceeding in *quo warranto*. The authority conferred on the governor by the Constitution of 1865 (art. 5, § 14) to fill a vacancy, confers no judicial authority.—Id.
4. *Office of judge—Term, continuance of till his "successor" is "elected and qualified"—"Vacancy"—Meaning of terms under Constitution of 1865—Death of judge elected and qualified, before commencement of his term—Right of predecessor to hold over in case of.*—In November, 1868, A. was elected judge of the —th judicial court. Under the Constitution of 1865 (art. 6, § 14) his term continued till the first Monday in January, 1875, and till his "successor" was "elected and qualified." In November, 1874, B. was elected as his successor, and was commissioned and took and subscribed his oath of office, and was shown to be of requisite age, and otherwise answering the requirements of law. On January 2d, 1875, two days before the commencement of his term, he died. Section 14, *supra*, authorized the governor, in case "any vacancy" should happen by death, etc., to order a new election. *Held*, that B. was qualified as the successor of A. within the meaning of the late constitution. And when so qualified, the right of A. to hold over ceased, and did not revive with his death; that consequently the death of B. created a vacancy, which, under § 14, *supra*, authorized the election of a new judge.—Id.
5. *Offices, public, vacancy in—Function of courts and legislature touching.*—The law abhors vacancies in public offices, and in doubtful cases the construction of a law fixing the tenure of such office would be greatly influenced by that consideration. But where there is clearly a *casus omissus*, the courts must leave it to the law-making power to make provision to avoid such consequence.—Id.
6. *Court, circuit—Resignation of judge to take effect at subsequent date—Election of successor, prior thereto, effect of.*—Where the judge of a circuit court in July, 1876, submitted to the governor of the State his resignation, the same, by its terms, to take effect in December of that year, its acceptance prior thereto would not vacate his office till the latter date, and an election of his successor

## OFFICERS, continued.

prior to December, 1876, would be invalid. (See Const. 1875, Art. VI, § 32; Wagn. Stat. p. 572, § 46; Sess. Acts 1873, p. 43.)—*State ex rel. v. McGrath*, 139.

7. *City council—Officer—Motion—Proceedings, what facts should be shown by.*—In a proceeding by a city council for removal of an officer for misconduct in office, the specific acts complained of should be stated, in order that it may appear as a matter of law that that body has jurisdiction of the offense. No intendments on that point or as to the regularity of the proceedings can be indulged in.—*State ex rel. Norton v. Lupton*, 415.

8. *Action on official bond—Variance between allegations and proof—Title of officer—Legislative acts, construction of.*—Where the petition in suit on an official bond charged that the principal was elected by the voters of Kaw Township, gave bond as "*Marshal of the Kansas City Court of Common Pleas*," the bond was given by defendants for the faithful performance of the principal of his duties as "*Marshal of Kaw Township*;" that this was the only bond ever given by this officer, who thereupon proceeded to discharge the duties of marshal of that court in the discharge of which the breach occurred. But it also appeared that the legislature had, prior to the election in question, by divers "public acts," used the terms "*Marshal of the Kansas City Court of Common Pleas*" and "*Marshal of Kaw Township*," interchangeably, in designating the officer who was to execute the process of that court, and that the legislature also, prior to said election, had provided "that all official papers, acts and duties of the Marshal of the Kansas City Court of Common Pleas which \* \* \* shall be executed under the name and style of "*Marshal of Kaw Township*, \* \* \* shall be legal \* \* \* as if done under the name of the "*Marshal of the Kansas City Court of Common Pleas*." Held, that there was no variance between the *allegata* and the *probata*, since either method of designation would be equally effective in designating the ministerial officer of that court.—*State v. Watkins v. Miserez*, 596.

See Attachment, 1, 2, 3; Constable; Court, Cass County, Common Pleas, 1  
Entomologist, State, 1; Justice of the Peace; Kansas, City of, 2, 3; Land  
and Land Titles, 8, 9.

OWNERSHIP; See Practice, criminal, 17.

## P.

## PARTNERSHIP.

1. *Partnership property—Rights of members to exemption of, from execution.*—The members of a firm are neither severally or jointly entitled to partnership assets exempted to heads of families under § 11 of the statute touching execution.—*State ex rel. Billingsley v. Spencer*, 355.

See Process, 4.

PASSENGERS; See Railroads, 9.

POWERS; See Wills, 1, 2, 3, 4.

PRACTICE, CIVIL; See Corporations, 1; Default, 1, 2.

## PRACTICE, CIVIL—ACTIONS.

1. *Actions—Multiplicity of suits—Knowledge of remedy, etc.*—Where, of certain stock stolen and purchased by a third party, the owner replevied a portion

## PRACTICE, CIVIL—ACTIONS, continued.

and afterward brought trover for the remainder, and it appeared that at the time of the first suit he had knowledge of the conversion of a portion of the stock claimed in the second, *held*, that for that portion his second action would not lie, but *contrawise* as to that touching the conversion of which he was ignorant. The rule prohibiting multiplicity of suits, has no reference to a case where the party has no knowledge of his means of redress.—*Moran v. Plankinton*, 337.

See Conveyances, 5; Damages, 10; Ejectment; Equity; Fraud, 5; Husband and Wife, 1; Malicious Prosecution; Mandamus, 1; Officers, 7, 8; Quo Warranto; Revenue, 4; Trespass, 1.

## PRACTICE, CIVIL—APPEAL.

1. *Practice, Supreme Court—Exceptions, bill of—Vacation.*—Unless on consent of parties made matter of record, the circuit court cannot grant permission to file a bill of exceptions in vacation.—*Mentzing v. Pac. R. R. Co.*, 25.

2. *Appeal without merit—Damages.*—Where an appeal is without merit, judgment will be affirmed with ten per cent. damages.—*Rose v. Cobb*, 464.

See Court, Greene County, Probate and Common Pleas; Divorce, 1; Practice, Supreme Court.

PRACTICE, CIVIL—PARTIES; See Administration, 3; Judgment, 3; Mechanic's Lien, 1, 2, 3.

## PRACTICE, CIVIL—PLEADINGS.

1. *Practice, civil—Bill of exchange—Record.*—A bill of exchange sued upon and filed with the petition constitutes no part of it.—*Phillips v. Evans*, 17.

2. *Equity—Action to set aside conveyance for duress—Allegations, sufficiency of.*—In suit in equity to set aside a deed of plaintiff for alleged threats made to him to prosecute his brother for adultery, unless the conveyance were made, where it is not alleged that his brother was innocent of the crime, or that such prosecution would be unlawful, no foundation is laid for the relief sought. Nor will it be afforded, although it is alleged that such declarations are coupled with threats to stir up a mob and hang his brother, where plaintiff does not lay the foundation for separate relief by alleging plaintiff's belief that his failure to execute the deed would result in the carrying out of the latter threats.—*Davis v. Luster*, 43.

3. *Instructions, pleadings, etc.*—Instructions should not be given on issues not made by the pleadings.—*Id.*

4. *Petition, two counts in, finding on but one—No motion in arrest, because no bill of exceptions—Attention of lower court not called to error.*—Where the petition contained two independent counts, but the finding for the defendant was only on the first, *held*, that this was not a general finding, and even if it were, the judgment should not be reversed, since there being no bill of exceptions, this court cannot know whether the attention of the lower court was called to the matter by appropriate motion.—*Marquis v. Clark*, 601.

See Administration, 3; Arbitration and Award, 4; Common Carriers, 2, 3; Equity, 3, 4, 5, 6; Executions, 3; Mechanic's Lien, 2, 4; Practice, civil—Trials, 4, 8.

## PRACTICE, CIVIL—TRIALS.

1. *Practice, civil—Instructions—Evidence.*—An instruction not founded on the pleadings and the evidence, is improper.—*Parker vs. Marquis*, 38.
2. *Instructions not misleading, revision of by Supreme Court.*—It is not to be expected that instructions in a *nisi prius* court will not be subject to criticism. It is only proper for a revising court to see that in the main they are not calculated to mislead.—*Tate vs. M., K. & T. R. W. Co.*, 149.
3. *Instructions—Evidence.*—Instructions not based on evidence should be refused.—*Weiland vs. Weyland*, 168; *Lillis vs. St. L., K. C. & N. R. R. Co.*, 464.
4. *Practice, civil—Pleading—Evidence—Contract with R. R. Co. for meals furnished employees.*—In suit against a railroad company for board furnished the employees under an alleged contract with the company, it was held proper to show a like arrangement made with prior parties, the evidence being supplemented by proof of an agreement to continue the arrangement with plaintiff, and in the absence of an affidavit showing that defendant was misled thereby, it was held that under the statute plaintiff might amend his petition by designating the price per meal agreed on for each employee.—*Krech vs. Pacific Railroad*, 172.
5. *Instructions—When properly given.*—Instructions which, taken in connection, correctly present the law of the case, are properly given.—*Id.*
6. *Instructions, when properly refused.*—Instructions not founded on the evidence nor having any application to the case, are properly refused.—*Id.*
7. *Practice, civil—General objection—Evidence excluded on account of—Ruling may be reviewed, when.*—Where testimony is excluded on a general objection, the fact that the objection is not specific, will not prevent a review of the ruling of the court, and a reversal, if the testimony was competent.—*Chaffe vs. Memphis, C. & N. W. R. R.*, 193.
8. *Damages—Railroads—Defects in machinery and track—Allegata and probata.*—Where an action for damages against a railroad is grounded on an alleged defect in construction of the engine, plaintiff cannot recover for an injury resulting from a defect in the track.—*Buffington vs. Atl. & Pac. R. R. Co.*, 246.
9. *Practice, civil—Instruction—Party cannot object to his own declaration of law.*—A case will not be reversed for error in giving an instruction for respondent, where the same declaration of law is given at the request of appellant. In such case the party is estopped from objecting, and is not prejudiced by the action complained of.—*Crutchfield vs. St. L., K. C. & N. R. R. Co.*, 255.
10. *Instructions—Refusal of, no error, when.*—The refusal of instructions substantially incorporated in others which are given is not error.—*Rickey vs. Zepfenfeldt*, 277.
11. *Instructions—Evidence, conflict of—Jury.*—Questions of conflicting testimony are properly left to the jury under appropriate instructions.—*Id.*
12. *Instructions—Refusal of proper, when.*—Instructions which are argumentative or misleading, or the substance of which is embodied in others, are properly refused.—*State vs. Orr*, 339.
13. *Instructions—Evidence, refusal of.*—Instructions abstractly correct, but not founded on the evidence, should be refused.—*Clark vs. St. L., K. C. & N. R. R. Co.*, 440.

See Default, 1

## PRACTICE, CRIMINAL.

1. *Indictment—Murder—Presence of prisoner—Failure of record to show.*—Where it does not appear affirmatively that the prisoner was present during the entire trial of an indictment for murder, or to show the presence of the jury during the hearing of evidence, such errors will work a reversal of the cause.—*State vs. Allen*, 67.
2. *Instructions—Faults in.*—Instructions should not be repetitions nor commentaries on the evidence.—*Id.*
3. *Indictment—Same offense charged in different counts—Prosecutor not compelled to elect, when.*—Where the several counts of an indictment refer to the same transaction and are intended to charge only a single offense, but are differently framed in order to meet the evidence as it may be developed at the trial, as where the accusation is for stealing sundry caddies of tobacco from a certain railroad depot, and also for receiving the same, knowing them to have been stolen from the depot, the prosecutor should not be compelled to elect on which count he will proceed.—*State vs. Sutton*, 107.
4. *Common Pleas Court of Sugartree township, Randolph county—Jurisdiction over offense committed before its establishment.*—A Common Pleas Court having been established for the township of Sugartree in the county of Randolph, in lieu of the circuit court of the county, "with exclusive original jurisdiction in all criminal actions," was authorized to try an offense committed before the act creating it took effect, where the circuit court had not theretofore acquired special jurisdiction of the case, by proceedings instituted therein.—*Id.*
5. *Indictment—Receipt—Hearsay, when.*—On indictment charging the stealing of property from a railroad company, a paper given by the consignee acknowledging the receipt of money in payment of the goods, is not competent to prove the loss of the goods. It is hearsay.—*Id.*
6. *Instructions, multiplicity of—Giving of others by court in lieu of.*—Where instructions are very numerous, the court may properly refuse them all, and present the case to the jury in a few clear and pointed ones of its own.—*Id.*
7. *Indictment—Larceny—Failure to specify articles stolen—Defective charge as to larceny—Effect of upon conviction of burglary, where indictment charges both.*—Where an indictment charges that defendant "burglariously and feloniously, etc.," entered a house "with intent to commit larceny by taking and carrying away, etc." certain specified goods, and adds in a separate clause that he did then "burglariously and feloniously steal, take and carry away, contrary" etc., the indictment is fatally defective, the phrase "by taking and carrying away," etc., not being an affirmative allegation of stealing; and the second clause failing to designate what was stolen. And defendant being charged with both larceny and burglary and being convicted in the same verdict of both, and there being nothing on which to base the verdict as to the former, judgment and sentence cannot stand as to the latter.—*State vs. Dooly*, 146.
8. *Indictment—Burglary—What charge of sufficient.*—An indictment which distinctly and with reasonable particularity charges the felonious and burglarious breaking and entering into a house, and the felonious intent thereby to commit larceny, is a sufficient charge of burglary.—*Id.*



## PRACTICE, CRIMINAL, continued.

9. *Practice, criminal—Record—Failure to show presence of prisoner at verdict—Effect of.*—On an indictment for felony, the failure of the record to show affirmatively that the prisoner was present at the rendition of the verdict will operate a reversal of the cause.—*Id.*
10. *Indictment—Venue, failure of evidence to show.*—When the evidence adduced at the trial does not show in what county the offense charged in an indictment was committed, judgment for the State will be reversed and the cause remanded.—*State vs. Meyer*, 190.
11. *Criminal law—Murder in first degree—Deliberation and premeditation essential to—Instructions.*—Homicide in order to constitute murder in the first degree under the Statute of Missouri, must be, not only willful and with malice but, with deliberation or premeditation. And these constituents are to be shown like any other facts, by direct proof or by circumstances from which their existence may be inferred by the jury.  
The giving of an instruction defining the crime, which omits these elements, will operate a reversal, although the offense be correctly described in another instruction. The latter does not cure the former.—*State vs. Mitchell*, 191.
12. *Criminal law—Murder—Malice—Presumptions as to.*—Malice is essential to murder both in the first and second degrees; and where unlawful killing is proved to have been done with a dangerous weapon likely to produce death, the malice requisite to murder is presumed.—(*See State vs. Lane*, post p. 319.)—*Id.*
13. *Criminal law—Keeping of bawdy house—Entry by city register of Sedalia—Proceeding under statute against same defendant for same offense—Evidence, how far character of house shown by that of inmates.*—In a criminal proceeding in Pettis County under the statute (Wagn. Stat., 502, § 19), an entry in the records of the city register of the city of Sedalia, that defendant had been found guilty of keeping a bawdy house, where the record further showed that defendant had pleaded "not guilty," and had appealed from the judgment, and there was no evidence in the State trial that the appeal had not been determined, was held inadmissible against the accused, and its introduction on error not cured by an instruction that if an appeal were still pending the facts shown by the record would not authorize a conviction; and the error will authorize a reversal of the cause. Contrawise, where co-defendants of the accused were shown by the entry to have been arrested by the recorder as inmates of the same house, and to have been convicted, and to have failed to appeal from his judgment, the entry would be admissible for the purpose of showing the character of the house kept by defendant.—*State v. Barnard*, 260.
14. *Instructions, misleading, refusal of.*—Instructions calculated to mislead should be refused.—*State v. Duncan*, 262.
15. *Indictment—Acquittal of burglary and conviction of larceny—Measure of larceny.*—On an indictment charging defendant in the same count with burglary and larceny, he may be acquitted of the former and convicted of the latter. (*See Wagn. Stat.* 455, 456, § 19; *State vs. Alexander*, 56 Mo. 131.) But in such case the degree of larceny or whether the offense be larceny, or merely a misdemeanor, must be determined by the value of the property taken.—*State v. Barker*, 282.



## PRACTICE, CRIMINAL, continued.

16. *Practice, criminal—Evidence—Verdict—Supreme Court will not disturb, when.*—In a criminal proceeding where the evidence is not preserved further than a general statement that it "tended to show" that the crime charged was committed, the verdict of the trial court will not be disturbed above, as against the evidence.—Id.
17. *Larceny—Indictment—Variance in name of owner, no ground of reversal, when.*—In the trial of an indictment for stealing the property of R. C. Stevens, proof that it was the property C. J. Stevens, will not under the statute of Missouri (Wagn. Stat. 1089, § 22), be ground for setting aside a verdict unless the court trying the cause shall find that the variance was in fact "material to the merits of the case, and prejudicial to the defense of the defendant."—Id.
18. *Murder in first and second degree—Facts necessary to constitute—Deliberation, premeditation and malice—Proof and presumptions as to.*—Under our statute he who uses a deadly weapon with fatal effect and with a manifest deadly purpose having sufficient time—be it long or short—to deliberate and fully form the purpose of killing, and without sufficient reasonable cause to apprehend immediate personal violence, or other sufficient cause or extenuation, is guilty of murder in the first degree. To that end deliberation, premeditation and malice, are not to be presumed but must be proved. The proof, however, need not be direct but may be shown by circumstantial evidence such as the above, and deduced by the jury from all the facts in the case.  
In murder in the second degree, deliberation and premeditation need not be shown, but only malice. And from the simple act of killing, the law will presume malice.—State v. Lane, 319.
19. *Practice, criminal—Homicide—Different grades—For what defendant may be tried under indictment—Question of grade when for jury—Instructions—Should be confined how—What will warrant reversal.*—Under an indictment for murder in the first degree defendant may be convicted of either murder in the first or in the second degree, or in any of the degrees of manslaughter of which the evidence may show him to be guilty. And where from the evidence the question of the grade is doubtful, the court may properly leave it to the jury to determine, under instructions defining the different grades to which the proof may apply.  
In such indictment if the evidence shows murder in the first degree and no other the court may confine its instructions to that grade and refuse to instruct as to any other. And an instruction as to other grades, in the absence of evidence applying thereto, will warrant a reversal.—Id.
20. *Instructions—Refusal of not error, when.*—The refusal of instructions substantially incorporated in those given is not error.—Id.
21. *Criminal law—Felony—Acquittal of, how shown—Acquittal of co-defendant—Proof of improper, when.*—Proof of acquittal of a felony must be shown by the records and cannot be proved by parol testimony. And the acquittal of a co-defendant cannot be introduced in any shape for the benefit of one charged with commission of a felony.—State v. Orr, 339.
22. *Criminal law—Evidence of guilt—Hypothesis if innocent.*—To establish the guilt of the prisoner the evidence must not only be consistent with a hypothesis of his guilt but inconsistent with that of his innocence.—Id.

## PRACTICE, CRIMINAL, continued

23. *Evidence—Jury—Falsus in uno, etc.*—When the jury believe that a witness has knowingly testified falsely to any material fact in the trial, they are at liberty to reject his entire testimony.—Id.
24. *Instructions—Refusal of proder, when*—Instructions which are argumentative or misleading, or the substance of which is embodied in others, are properly refused.—Id.
25. *Indictment—Murder—New trial—Prejudice of juror, what sufficient to warrant.*—Where it appeared, on a motion for a new trial on an indictment for murder, that one of the jury had formed such a prejudice against the accused that he could not be an impartial juror, the prisoner would be entitled to a retrial, although the juror had formed no opinion as to his guilt or innocence, and his prejudice was formed merely upon rumor, and not upon evidence at the trial. In such case the grant of a new trial does not turn on the question of the competency or incompetency of the juror alone, but on the question whether the prisoner will have an impartial trial.—*State v. Taylor*, 358.
26. *Murder—Threats, etc., made by deceased and not communicated to prisoner.*—On an indictment for murder, proof of threats made by deceased against the prisoner, or wrongs done or slanders uttered, touching the family of the prisoner, knowledge whereof is not shown to have been communicated to the latter, is incompetent.—Id.
27. *Criminal law—Dram shop license—Sale of liquor without—Act of 1874, taking effect June 1st.*—Under the act of March 20th, 1874 (Adj. Sess. Acts, 1874, p. 46), an indictment which charges defendant with selling liquor subsequent to June 1st, 1874, when said act went into effect, without a dram shop license, and which fails either generally or specially to negative the fact that defendant was authorized to sell as a druggist or otherwise, is bad. Contrawise, where the indictment, although brought subsequent to June 1st, charges sales to have been so made prior thereto, the indictment would have been good, and proof of sales anterior to that date would be admissible.—*State v. McBride*, 364.
28. *Practice, criminal—Indictment—Pleas in abatement—What insufficient.*—Pleas in abatement to an indictment on the grounds that one of the grand jurors returning the same was not a freeholder or householder of the county; that he was not selected as a grand juror by the county court, and that defendant was not present when that jury was sworn so as to challenge said juror or the array, are bad on demurrer.—*State v. Brown*, 367.
29. *Indictment for murder—Exclamation after killing that deceased had a knife not res gesta.*—On an indictment for murder, the testimony that witness heard a little girl, after the killing, exclaim "Mr. L. (meaning the deceased) had a knife in his hand," was held inadmissible. Such exclamation is no part of the *res gesta*.—Id.
30. *Homicide, trial of—Jury—Proof that they were on site of casualty—Effect of.*—Proof of the fact that on trial of an indictment for homicide, the jury were on the ground where the killing took place, where it did not appear that they were looking at the ground with a view to understanding how the deed was done, nor that they said anything about it or conversed among themselves about the ground, and there was no question as to the locality of the homicide, or that the witness testifying thereto was in a position to see what he related, will not authorize a new trial.—Id.

## PRACTICE, CRIMINAL, continued.

31. *Evidence—Falsus in uno, etc.*—An instruction which tells a jury that they may disregard the testimony of a witness who has testified falsely in any particular, without describing such testimony as wilfully or intentionally false, is improper; but the giving of such instruction will not operate a reversal, where it does not appear to have wrought injury to the appellant.—Id.
32. *Criminal law—Murder—Self defense—Doctrine of, when may be invoked.*—When defendant, in an indictment for homicide, brings on or voluntarily enters into a difficulty which results in the death of his antagonist, however high the passion of defendant or however imminent the danger to him may have become during the difficulty or conflict, the plea of self defense cannot be invoked.—Id.
33. *Criminal law—Provocation and danger not sufficient to reduce murder to lower mode of crime.*—No provocation short of personal violence, nor any peril not apparent and imminent, will be sufficient to reduce the crime of murder to a lower order of homicide.—Id.
34. *Homicide—Threats to kill prisoner—Presumption of continuance of purpose, etc.*—The fact that the deceased threatened to kill the prisoner, or to do him great bodily harm, does not raise the presumption of law that the purpose continued down to the time of the killing, and that deceased was present at the time for the purpose of carrying out such threat.—Id.
35. *Indictment—Homicide—Want of provocation—Burden of proof.*—In an indictment for murder, the burden of proof is not upon the State to show that the prisoner killed the deceased without any justifiable or legal excuse or extenuating circumstances.—Id.
36. *Practice,—Entries nunc pro tunc—On what foundation may be made.*—Where a clerk omits to make an entry which was ordered to be made, or makes a different entry from that which was ordered, the court may at a subsequent term amend the record so as to make it conform to the truth; provided some entry either in the minutes kept by the judge or clerk, or some paper filed in the cause sustaining them shows facts from which the amendment can be made. It cannot be so amended by evidence *aliunde*, nor by facts in the breast of the judge.—State v. Jeffors, 376.
37. *Practice, criminal—Amendment of entries nunc pro tunc at subsequent term—When improper—Autrefois acquit, etc.—Discharge of jury by operation of law, effect of.*—On the trial of an indictment for a felony, where the case is submitted to the jury, and the only entry in the record showing what became of the jury is that "after hearing the allegations, proof and pleadings as well on behalf of the State as on the part of defendant they retired to consider of their verdict," and no record is made on the judge's docket or clerk's minutes in regard to the discharge of the jury or the continuance of the cause, the court cannot, at a subsequent term and on an affidavit of the clerk, direct the entry of a *nunc pro tunc* order showing the discharge of the jury. But such state of the record will not authorize the discharge of the prisoner on motion, at a subsequent term, nor bar his subsequent trial for the same offense. For his life was not thereby judicially put in jeopardy, nor do such entries on the record raise the legal presumption of an acquittal. (See Const. Bill of Rights, § 23.) And the discharge of the jury either where the term expired by limitation or *ex vi termini* by the commencement of another term will not bar a re-trial.—Id.

## PRACTICE, CRIMINAL, continued.

38. *Jury—Discharge of in cases of felony—Power of court should be exercised, how.*—The power of a court to discharge a jury in cases of felony should be exercised with great caution.—*Id.*
39. *Murder—Indictment—Allegations as to time and place of death—Defects in, what will authorize quashing of writ—Jeofails, statute of.*—An indictment for murder which charges that "of said mortal wounds said A. did immediately languish, and languishing did die," is defective in not specifically alleging when and how long after the wounding the death occurred. The defect is not cured by the statute of jeofails, and will authorize the quashing of the indictment.—*State v. Sides, 383.*
40. *Criminal law—Indictment for disturbing worship on a public square in sufficient, when.*—Where an indictment set out that defendant by indecent behavior and profane discourse, and by attempting to drive a horse and wagon through them, did disturb a congregation "met for religious worship at the southeast corner of the public square, in the city of Hannibal," it was held that under the statute (*Wagn. Stat. 504, § 30.*) that act was intended to protect camp meetings held on a piece of ground set apart for that purpose, and assemblages gathered within a house or place of worship, and not public squares and streets. If a portion of a public square were a place of public worship, that fact should be made distinctly to appear in the indictment.—*State v. Schieneman, 386.*
41. *Indictment—Instruction to convict of murder or acquit.*—Where the evidence is of a character to authorize it, the court may properly give an instruction that the jury must either convict the prisoner of murder in the first degree, or acquit him.—*State v. Jones, 391.*
42. *Practice, criminal—Murder—Intent, continuance of, for what length of time necessary.*—If homicide is committed, not in the heat of passion or with lawful provocation, and the prisoner deliberately and with malice aforethought intend the killing for any length of time beforehand, no matter how short, he is guilty of murder in the first degree.—*Id.*
43. *Instruction commenting on evidence.*—An instruction singling out a portion of testimony and commenting thereon is improper.—*Id.*
44. *Murder—Uncorroborated testimony of accomplice, how to be received by juries*—The testimony of those abetting and encouraging murder in relation thereto, when uncorroborated by that of others not implicated, although admissible, should be received with great caution by the jury; and they should not convict on such testimony alone, unless satisfied of its truth.—*Id.*
45. *Instruction—Evidence—Refusal of.*—An instruction not based upon evidence is properly refused.—*Id.*
46. *Witness—Recalling of, for purpose of impeachment.*—A party after cross-examining a witness of the other side may by permission of court recall and question him for the purpose of impeaching him, and afterward introduce other testimony to that end. He does not by so recalling him make the witness his own.—*Id.*
47. *Witness called for particular purpose—Cross-examination of.*—*Semble*, that a witness examined on any point may be cross-examined by the other side touching all matters pertaining to the case.—*Id.*

## PRACTICE, CRIMINAL, continued.

48. *Jury—Competency of juror.*—The fact that he is father-in-law of the prosecuting attorney does not render a juror incompetent.—Id.
49. *Murder—Indictment—Failure to allege in what part of the body wound was given—Jeofails, statute of.*—An indictment for murder which alleges that the prisoner \* \* \* "did strike, penetrate and wound him, the said E., in and about divers places of the body," etc., is not under the statute of jeofails (Wagn. Stat., 1090, 1091, § 27 and clause declaring an indictment not invalid "for want of the averment of any matter not necessary to be proved") fatally defective for failing to state in what part of the body the wound was inflicted; since it is not necessary to prove that fact as alleged, if stated.—*State v. Edmundson*, 398.
50. *Murder, indictment for—Shackles on prisoner—Power of court in criminal trials—Rights of prisoner—Previous assault by.*—As a general rule, a prisoner is entitled, as a matter of right, to be freed from his shackles when brought into the court room for trial, but this rule is not of universal application. The court has the power to take all necessary steps to have the trial a quiet and safe one, even to binding the prisoner with fetters. But there must be some good and sufficient reasons for pursuing such extraordinary course, else the judgment of conviction will be reversed; and the fact that the prisoner had made, in the court room, an assault upon a person, will not justify his being shackled, three months thereafter, when put upon his trial.—*State v. Kring*, 591.
51. *Sanity of prisoner—Letters of, when admissible in evidence—Secondary evidence.*—When the sanity of the prisoner is involved, a letter written by him, prior to the commission of the alleged offense, is admissible in evidence to throw light on the condition of his intellect at the time of the act charged. And on its being satisfactorily established that such letter was destroyed, secondary evidence of its contents ought to be admitted.—Id.
52. *Instruction erroneous respecting murder in first degree, but harmless.*—Where the lower court gave, for the State, an erroneous instruction respecting the constituent elements of murder in the first degree, as ruled in *State vs. Foster* (61 Mo. 548) and *State vs. Lane* (64 Mo. 319), but where the evidence showed that, if defendant was sane, the killing was done with malice premeditation and forethought, and when the instructions for the defendant were very favorable, held, the error was not reversible error.—Id.
53. *Concluding arguments by circuit attorney—Improper remarks by circuit attorney—Distinction between civil cases and those involving life and liberty.*—The trial court should not permit the circuit attorney to indulge in a line of remark calculated to induce the jury to (do that very common thing) shirk responsibility, by throwing it on the higher courts. (*Lloyd v. H. & St. Jo. R. R. Co.* 53 Mo. 514, distinguished from the case at bar.)—Id.

See Conspiracy, 1, 2; Court, Cass County, Common Pleas, 1; Practice, Supreme Court, 2, 3; Trespass, 1.

## PRACTICE, SUPREME COURT.

1. *Practice, Supreme Court—Levy, mistake in—Appeal—Corrections—Reversal unnecessary when.*—Where motion was made to quash the levy of an execution for the reason that the ground described therein was part only of that occupied by a building, and that sale under it would entail a ruinous sacrifice,



## PRACTICE, SUPREME COURT, continued.

and the case went up by appeal, it was held that as no sale had taken place under the levy, the circuit court should simply be directed to correct the error of description and that the cause need not be remanded for that purpose.—*Phillips v. Evans*, 17.

2. *Indictment—Change of venue—Testimony—Action of lower court—Review of*.—Where, in a criminal case, on an application for change of venue on the ground of prejudice against the prisoner, testimony is offered *pro* and *con* (See *Sess. Acts* 1875, p. 109) the Supreme Court will not interfere with the action of the trial court in overruling the motion.—*State v. Taylor*, 187.
3. *Practice, Supreme Court—Evidence—Instruction—Bill of exceptions*.—Evidence and instructions not incorporated in bill of exceptions will not be reviewed by Supreme Court.—*Id.*
4. *Practice, Supreme Court—Bill of exceptions—Exceptions to actions of court, etc. not incorporated in—Record proper only, will be reviewed*.—On trial of an indictment where no exceptions to the admission or rejection of evidence, or the giving or refusing of instructions, or the action of the court in overruling motions are preserved in the bill of exceptions, the Supreme Court can review nothing but the record proper, i. e., the indictment, and the subsequent pleading including verdict and judgment.—*State v. Pints*, 317.
5. *Practice, Supreme Court—Evidence—Bill of exceptions*.—The Supreme Court will notice no evidence not embodied in the bill of exceptions.—*Wilcox v. Todd*, 388.
6. *Practice, civil, agreed facts, how treated on appeal*.—Facts agreed upon in a case are, on appeal, to be treated as though found by a jury in a special verdict.—*Shaw v. Padley*, 519.
7. *Practice, civil—Bill of exceptions—Instructions, loss of*.—The statement contained in a bill of exceptions that the instructions were not copied therein because they had been taken away by the jurors or lawyers and not returned, will not warrant a reversal in the absence of any proof that they were not before the court on hearing of motion for new trial or proof of any efforts to supply their loss.—*Witthouse v. Atl. & Pac. R. R. Co.*, 523.
8. *Practice, Supreme Court—Assessment of damages—Verdict—Judgment—Remittitur*.—Where judgment is rendered for damages not assessed in the verdict, the assessment will not require a reversal if the amount thereof is remitted by respondent, but *semble*, that in case of affirmance, respondent should pay the costs of the appeal.—*Miller v. Hardin*, 545.
9. *Bill of exceptions—Record proper*.—Where the bill is stricken out on motion, nothing remains for examination but the record proper, and if no error be discovered therein, the judgment will be affirmed.—*Marquis, et al. v. Clark*, 601.
10. *Petition, two counts in, finding on but one—No motion in arrest, because no bill of exceptions—Attention of lower court not called to error*.—Where the petition contained two independent counts, but the finding for the defendant was only on the first, *held*, that this was not a general finding, and even if it were, the judgment should not be reversed, since there being no bill of exceptions, this court cannot know whether the attention of the lower court was called to the matter by appropriate motion.—*Id.*

See *Banks and Banking*, 1; *Divorce*, 1; *Executions*, 3; *Habens Corpus*, 3, 4; *Maudamus*, 1; *Practice, criminal*, 16, 17, 19; *Revenue*, 4; *Special Taxes*, 1



PRESUMPTIONS; See Land and Land Titles, 4, 5; Practice, criminal, 12.

PRINCIPAL AND AGENT; See Attorney at Law, 1.

PRINCIPAL AND SURETY; See Surety.

PROCESS.

1. *Sheriff—Amendment of returns—Service—Omission of word "person"—Middle name of defendant.*—The recital in a sheriff's return served upon a "member of the family" etc. of defendant instead of upon a "person a member of the family" etc., or its insertion of the initial letter of a middle name when he has none, are immaterial, and may be amended. Amendments of returns are now authorized both by statute and an unbroken uniformity of decisions.—*Phillips vs. Evans*, 17.
2. *Sheriff's return—Contradiction of—Amendment of—May be attacked in equity but not by motion.*—The return of an officer is conclusive as to the fact therein recited, except in an action for a false return. And on the same principle a proposed amendment to a return cannot be defeated by evidence contradicting such proposed amendment. Equity may interfere to prevent the perpetration of a fraud either by a consummated or by a contemplated amendment, but such interference cannot be invoked in aid of a motion.—*Id.*
3. *Practice, civil—Service of summons on member of the family.*—A return showing service of process on a defendant summoned subsequently to the first, by leaving a copy etc. with a "member of the family" (*Wagn. Stat.*, 1007, § 7) is good.—*Id.*
4. *Practice, civil—Suit on open account—What services insufficient to authorize final judgment at return term—Partnership.*—Where suit is brought in the circuit court upon an open account, nothing under the statute (*Wagn. Stat.*, 1053, § 10) short of a delivery to each defendant of a copy of the petition or of the account, with the items set forth, is sufficient service to authorize final judgment at the return term; and the fact that of two or more defendants, the first is personally served, will not authorize such judgment against a subsequent defendant on proof of service at his place of abode, etc. And it makes no difference that defendants are sued as a firm. (See *Phillips vs. Evans*, *ante* p. 17.)—*Clark vs. Evans*, 258.

See Corporations, 2; Executions.

PROTEST; See Bills and Notes, 1, 2.

## Q.

QUO WARRANTO.

1. *Quo warranto—Jury.*—In cases of information in *quo warranto*, defendant has no constitutional right to trial by jury.—*State ex rel. Norton vs. Lupton*, 415.  
See Officers, 1, 2, 3.

## R.

RAILROADS.

1. *Subscription to railroad on condition as to location of road and depot—Non-fulfilment of condition on subsequent request of inhabitants, etc.*—Where the inhabitants of a township vote for subscription to a railroad on condition that the road shall be constructed and its depot built within a mile of a certain

## RAILROADS, continued.

town, it is no excuse for non-compliance by the company with that condition that the non-performance was "at the request and desire" of the inhabitants of the town.

The power of the voters is merely statutory and exhausts itself at the polls on the day of election. And any subsequent action on their part would have no legal validity. And *a fortiori* the request of a portion of the inhabitants of the township is no excuse for such failure.—State ex rel. St. L., C. B. & Q. R. R. Co. vs. County Court of Daviess Co., 30.

2. *Corporations, municipal—Liability for occupation of streets by railroads.*—Where a municipal charter so allows, a railroad may be constructed on a street by permission of the municipal authorities, and neither the municipality nor the railroad company will be responsible for the inconvenience and damage resulting from such construction. But this rule applies only to a railroad constructed on the grade of the street, where the only obstruction is the passage of the trains, and not where embankments have been made above the grade, or where the street is used for side tracks or other structures for the convenience of the road.—Tate vs. M., K. & T. R. W. Co., 149.
3. *Railroad—Lessee—Nuisance, liability for.*—A party in whose possession and control a railroad is placed, with power to continue its use, is equally liable with the original owner for a nuisance arising from the manner of its construction.—Id.
4. *Railroads—Damages to stock—Failure to erect fences and cattle guards at stations—Negligence.*—From motives of public policy the failure of a railroad to fence its track at a station, will not render it liable for the killing of stock at that point, except on proof of actual negligence. And the same rule will obtain touching failure to construct cattle guards at such locality, where it appears that the access of the public to the station would thereby be interfered with.—Robertson vs. Atl. & Pac. R. R. Co., 412.
5. *Railroads—Damages—Sitting on trestle work—Instruction as to safety of, etc.*—Where a boy sitting on trestle work under one of a train of freight cars was run over and killed by the starting of the train, an instruction was held proper which declared as a matter of law that his position was an unsafe one, without leaving the question to the jury to determine, under all the circumstances.—Ostertag vs. Pac. R. R. Co., 421.
6. *Railroads—Injuries to child—Platform—Trespass—Contributory negligence—Liability of company, measure of.*—In suit against a railroad company for injuries to a child, it appeared that at a station where the accident occurred, by direction of his father the boy was in the habit of driving stock from the track before the arrival of trains, and would then seat himself on the platform of the station, and was accustomed to get on freight trains on their arrival, and ride to the switch; that the platform had been built by the company for the accommodation of passengers and persons having business with the road, and that the lad had been frequently told to keep off the platform; that while standing there he was struck and injured by a timber projecting from a freight car: *Held*, that the direction was under the circumstances merely admonitory and not imperative in such sense as to make him, by reason of the order, a trespasser; that his having no right or business there did not constitute him a trespasser, and his being there was not such neg-

## RAILROADS, continued.

- ligence as in law to contribute directly to his injury; that even supposing the child were a trespasser, the liability of the company to him for injuries would not be restricted to those which were wanton, but would embrace all such as resulted from want of ordinary care.—*Hicks vs. Pac. R. R. Co.*, 430.
7. *Railroads—Risks in running past stations, etc.—Caution required.*—The care and caution required of railroad companies in running their trains are commensurate with the danger to persons and property incident to that mode of conveyance; and in running through towns and cities and over public crossings, or in the vicinity of railroad stations, they must exercise care and caution commensurate with the risks of accidents at such places.—*Id.*
8. *Charter of M., I. & N. R. R.—Railroads—Condemnation of land—Acquiescence in, by owner, what acts not equivalent to—Subsequent restraining order.*—The charter of the Mo., Iowa. & Nebr. R. R. (Sess. Acts 1851, §§ 7, 9, 10, 483; Sess. Acts 1857, § 10,) provided that on tender or deposit of the amount found by the commissioners due the land owner on condemnation of his land for railroad purposes, the company might go on and complete the road. A land owner having excepted to the report of the commissioners, under such proceeding, it was held that he having exhausted his statutory remedies his failure to ask for an injunction or the appointment of a receiver or other equitable intervention, while the road was being constructed over his land, was not tantamount to an acquiescence in its construction, but that after its construction, the road being insolvent, he was entitled, on proper steps taken, to payment of the amount awarded, or in default thereof to an order restraining the company from operating its road over his property.—*Evans v. Mo. Neb. & Iowa R. R. Co.*, 453.
9. *Railroad—Commutation ticket—Ejection of holder—Rights and liabilities of company—Passenger and trespasser.*—Where the holder of a 1000 miles railroad commutation ticket, expressed to be "good for six months only," after that period had elapsed, having first obtained legal advice that the ticket was good till the thousand miles were traveled, and before the ticket was exhausted, took his seat in the baggage car of a train, refused payment of fare otherwise than by offering his ticket, and was forcibly ejected from the train. *Held*, that the ticket was void; that the holder was not a passenger but became a trespasser on entering the baggage car and upon his refusal to get off might be ejected, with the use of any force necessary to that end, and at a point contiguous neither to a station nor dwelling house; that the statute (Wagn. Stat. 307, § 28) had no application to such a case.—*Lillis v. St. L., K. C. & N. R. R. Co.*, 464.
10. *Railroads—Damages—Contributory negligence.*—A stranger, in stepping out from behind a train of cars standing upon a side track of a railroad, to cross another track seven feet removed, was run over by a "pony" engine and killed. The engineer failed to ring the bell, but the locomotive could have been heard, while moving, at a distance of from one to two hundred yards. The engineer did not see the decedent, but, had he done so, could not have stopped the engine soon enough to prevent the accident; whereas the other might have both seen and heard the engine in time. *Held*, that although the failure to ring the bell was negligence in law, yet since the casualty was di-



## RAILROADS, continued.

rectly caused by the negligence of the deceased, and, after he stepped from behind the train, could not have been prevented by the engineer, the company was not liable.—*Harlan v. St. L., K. C. & N. R. R. Co.*, 480.

11. *Negligence—When question of for court.*—Ordinarily the question of negligence is one for the jury, under proper instructions, but where there is no conflict in the evidence as to the facts, or where they are undisputed, the question whether they amount to negligence, or to contributory negligence, is one to be determined by the court.—*Fletcher v. Atl. & Pac. R. R. Co.*, 484.
12. *Railroad—Public crossing—Injuries—Failure to ring bell—Negligence direct and contributory.*—The failure of a railroad company to comply with the statute in ringing its bell or blowing its whistle on approaching a public crossing is negligence in law. But where the party receiving the injury contributes directly thereto, as where having an unobstructed view of the railroad, so as to know of the approach of a train in sufficient time to avoid the collision, he attempts to pass over a public crossing, above which is a signal to "look out for the cars," and is struck in so doing, his injury is directly caused by his own negligence, and he cannot make the failure of the company to ring its bell or blow its whistle the foundation of a claim for damages.—*Id.*
13. *Railroads—Damages—Stock pass—Ejection of wife.*—In an action of damages against a railroad company, by A. and his wife, for ejecting the latter from a train, it appeared that A. made a special contract with defendant for the transportation of stock, which contract provided that none but the owner or persons in charge of the stock should be entitled to a return pass. A. applied to the agent of the road for a pass for his wife, stating that she was the owner of a part of the stock; whereas, she neither owned nor had charge of any of the stock. On this statement the agent issued the pass, saying at the time that he had no authority to issue one to a lady, and doubted if the conductor would recognize it. The pass was given "on account of stock account surrendered," and bore endorsed on the back an acceptance by the wife, subject to its conditions and with the expressed stipulation, that the company should not be liable for any injury to her person or property. The wife, being in company with her husband, offered her pass, which the conductor refused to recognize, and, on her declining to pay the required fare, handed her, without any violence or incivility, from the train; whereupon the fare was paid and plaintiffs re-entered the train and proceeded upon their journey. *Held*, that the procurement of the pass from the agent, by misrepresentations, was a fraud upon the company which vitiated the contract; that it was obviously the intention of A. to pay the fare, if necessary to enable his wife to ride, and in view of this fact and the conduct of the conductor, plaintiff had no ground for punitive damages, such as might be given in case of a real expulsion.—*Brown et al. v. M., K. & T. R. W. Co.*, 536.
14. *Railroads—Damages—Interest not allowable, when—Failure to ring bell, averments of petition as to.*—1st. In suit against a railroad for damages for the killing of stock in consequence of the negligence of the company, plaintiff's interest on the amount of damages from the date of the accident is improperly allowed. 2d. In such suit defendant cannot be held for negligence in failing to ring its bell as required by statute, unless such negligence is in some manner

**RAILROADS, continued.**

made to appear in the petition, either by stating the facts which under the statute create the liability, or by some appropriate reference to the statute itself.—*Meyer v. Atl. & Pac. R. R. Co.*, 542.

See *Damages*, 2, 3, 4, 5, 6, 7, 8, 9; *Revenue*, 2; *Statutes, Construction of*, 2, 3, 4, 5.

**RECEIPT**; See *Bailment*, 1.

**RECORD**; See *Administration*, 4; *Conveyances*, 1, 4; *Practice, civil—Pleading*, 1; *Practice, Supreme Court*, 4.

**REGISTER OF THE UNITED STATES LAND OFFICE**; See *Land and Land Titles*, 8, 9.

**REMOVAL OF CAUSES TO UNITED STATES COURTS.**

1. *United States Courts, removal of causes to—Power of State Courts after.*—Where proper application is made by defendant for the removal of a cause from the State to the United States Court, the former can proceed no further with the cause, and a non-suit cannot be taken therein by plaintiff.—*Beery v. C., R. I. & Pac. R. R. Co.*, 533.

**REPLEVIN.**

1. *Replevin—Instructions—Ownership—Burden of Proof—Preponderance of evidence.*—In replevin an instruction that unless the jury believe that defendant is the owner they will find for plaintiff, is error.

In such suit a further instruction that, unless the jury are satisfied "from a preponderance of evidence" that plaintiff is the owner, they will find for defendant, is not such error as will warrant a reversal. (See *Clarke vs. Kitchen*, 52 Mo. 316.)—*Berry v. Wilson*, 164.

**RES ADJUDICATA**; See *Habeas Corpus*, 2, 3, 4.

**REVENUE.**

1. *State Board of Equalization—Legislation not necessary to effectuate constitutional provision regarding.*—The governor, State auditor, treasurer and secretary, and attorney general are constituted the State board of equalization by virtue of art. X, § 18, of the present Constitution, and authorized to act without any legislation to that effect.—*Han. & St. Jo. R. R. Co. vs. State Board of Equalization*, 294.
2. *Railroad—Apportionment of taxation to counties, etc., constitutional.*—Section 8 of the act of March 15, 1875, (Sess. Acts 1875, p. 121) under which the amount of the "land contracts" of the Hannibal & St. Joseph Railroad Company was apportioned to the counties, cities and towns along the route of the road and its branches, is not unconstitutional.—*Id.*
3. *Taxation—Power of legislature regarding.*—The taxing power of the legislature is subject to no restrictions or limitation outside of the United States and State constitutions.—*Id.*
4. *Certiorari—State Board of Equalization—Evidence outside of record not subject to review.*—*Certiorari* is a common law writ, and can bring up for review only such facts as appear on the face of the record. Hence, where this writ is invoked against proceedings by the State Board of Equalization for the assessment of railroad property, inasmuch as the evidence below touching its value is not required to be preserved in the record, it cannot be examined, nor the appraisal of the board based thereon, disturbed by the Supreme Court.—*Id.*



## REVENUE, continued.

5. *Board of Equalization—Power under act of 1875 to assess without hearing evidence—Power to assess under Const. art. X, § 18.*—Under § 7 of the act of 1875 (Sess. Acts 1875, p. 121) the State board of equalization had power to equalize adjust and assess railroad property without the hearing of testimony. And it had the power to assess as well as to equalize and adjust under § 18, art X, of the present Constitution. (As to the construction of § 18 Napton and Hough J. J., did not concur.)—*Id.*

See Special Taxes, 1.

## S.

## SALES.

1. *Sale—Title passes without transfer of possession, when.*—A sale without delivery or possession taken by the vendee passes the title, if the property is of such a nature and so situated that his possession would be impracticable or inconvenient. So where the article, though bought in general terms from a large number of the same description, is afterwards selected and set apart with the assent of the parties as the thing purchased.—*Rickey vs. Zeppenfeldt*, 277.
2. *Contract—Part fulfillment—Measure of damages.*—Where by the terms of the contract for the sale of certain saw logs ; they were to be "received and paid for when as much as 50,000 feet were ready," if they received less than that number they would be liable on the *quantum meruit*, for what they got, taking the contract price as their value, if the agreement had been carried out and making proper allowance for the difference between that and the value of the logs furnished.—*Id.*
3. *Vendor and purchaser—Dependent and independent covenants—Consideration moving to third party.*—Where A. covenanted to convey to B. by deed of warranty a tract of land, in consideration that B. should assume a mortgage on the land and give his note for a balance due from A. to C., and B. permits the property to be sold under the mortgage to a third party, it is not necessary, in order to entitle C., to recover on his note against B., to deliver to the latter a deed to the land from A. The payment by B. of the mortgage note and discharge thereby of the liens were a condition precedent to his right to the deed.—*Cress vs. Blodgett*, 449.

See Administration, 3, 4 ; Execution, 3 ; Mortgages and Deeds of Trust, 3.

## SCHOOLS AND SCHOOL LANDS.

1. *Public schools—Warrant for wages of teacher in colored schools payable out of teachers' fund—School law of 1874—Construction of.*—The public school law of 1874 (see Adj. Sess. Acts 1874, p. 147, compare §§ 28, 29, 43, 65, 73, 85, 86, and 90), properly understood, does not create a separate fund for the support of colored schools, upon which warrants for the payment of teachers of such schools must be drawn. But warrants for the payment of teachers of both white and colored schools of the same district are properly drawn upon the teachers' fund of said district.

Under a proper construction of § 90, it was simply intended to provide that the money raised by taxation for building purposes could be applied only to that purpose, and that the money raised by taxation for other purposes could not be paid out for building.—*State ex rel. Humphries vs. Thompson*, 26.



## SCHOOLS AND SCHOOL LANDS, continued.

2. *Schools—Sub-district—Organization of towns with adjacent territory—Votes—Particulars as to, what unessential to validity of organization—Directors—Ouster of, grounds for.*—Territory embraced in a school sub-district outside of and adjoining an incorporated town may, under art. 2, § 1, *et seq.* of the school law (Wagn. Stat. 1262), be organized at the same time with that part within the corporate limits.

And it is not necessary, to render such organization lawful, that the voters of the sub-district residing within and without the corporate limits shall be in a certain ratio to each other, or that all or any given number of those qualified shall vote at the election, or that the votes shall all be lawful, provided that a majority of the lawful ones are for the organization. And *a fortiori* no such grounds will lie for ouster of directors elected under such organization, where there is a general acquiescence in the organization and election till the issue of bonds by the sub-district, and the erection of a school house from the proceeds.

And to authorize ouster of the directors for failing to receive a majority of the qualified votes, that fact must appear affirmatively.—*State ex rel. School District No. 2, T. 39, R. 28, St. Clair Co. vs. Board of Education of Appleton City, 53.*

3. *County court—School lands, purchase of—Injunction against purchaser—Recovery against members of county court on injunction bond—Reimbursement of sum recovered, etc.*—Where prior to the payment of the purchase money for sixteenth section school land, injunction suit is brought in good faith, on behalf of the county, against the purchaser, to stay waste, certain members of the county court executing the injunction bond, those officers will be entitled to reimbursement out of the purchase money, when paid by the vendee of the land into the township fund, for any sum which may have been recovered from them on this bond on dissolution of the injunction. In the bringing of said suit and the execution of such bond, members of the county court act not judicially but ministerially, and as agents of the State for the benefit of the township, and are justified, taking the same measures to protect the property of the State as though it were their own.

And although the money is paid over under order of the county court a majority of which are makers of the bond and distributees of the fund, the issuance of the order is not a judicial proceeding but a purely ministerial act, and at worst merely informal and will not be abrogated unless shown to have been made corruptly.—*Washington Co. to use of School Fund of Township 36, etc. vs. Boyd, 179.*

SEAL; See Contracts, 1; Conveyances, 1.

SEDALIA, CITY OF; See Practice, criminal, 13.

SEPARATE ESTATE; See Husband and Wife, 1.

SERVICE; See Corporations, 2; Executions; Justices' Courts, 1; Mechanic's Lien, 1, 3; Process, 1, 2, 3, 4.

SHERIFF; See Process, 1, 2, 3.

## SPECIAL TAXES.

1. *Special tax bills, evidence of contract with city, when—Evidence—Prima facie case made out by bill—Evidence contra will not be reviewed, when.*—Under a municipal charter which provides that a special tax bill shall "in any action

## SPECIAL TAXES, continued.

brought thereon be *prima facie* evidence that the work and material charged in such bill have been furnished, and of the liability of the parties therein named as the owner of the property," the bill itself furnishes presumptive evidence of the existence of the contract under which the work was done. Such bill being put in evidence furnishes a *prima facie* case, and no declaration of law being given, the Supreme Court will not review the opposing evidence for the purpose of determining whether it be sufficient to overthrow the case so made out.—*Ess v. Bouton*, 105

See *Kansas, City of*, 1.

## STATUTE, CONSTRUCTION OF.

1. *Statute, construction of*—Particular words and passages, how construed.—

Where particular words or clauses of a statute are of doubtful import, they should be construed in connection with the entire statute, and if their literal construction would lead to a conflict in the statute, or to absurd conclusions, they should be restricted or enlarged so as to render the statute harmonious and sensible.—*PER CURIAM*.—*Proctor v. Hann. & St. Joe. R. R. Co.*, 112.

2. *Damage act*—Death caused by negligence of co-employee—Selection of, care of company in reference to—Section 2, of Damage Act, merely transmits cause of action.—The master cannot be held for injuries received by one servant through the negligence and unskillfulness of his fellow servant, unless in the selection of the latter the master fails in care and diligence, or retains him after knowledge of his character; and § 2 of the Damage Act, properly construed in its context, gives the representative of a deceased railroad employe no right of action against the company for death caused by the negligence and unskillfulness of a co-employe, except where his selection or retention is attributable to the want of care in the company.

The phrase "any person," as used in that section, does not include fellow servants.

The right designed to be conferred by § 2 is analogous to that given by § 3, and not an original one created after the death of the employe, but a right which the deceased might have exercised, had he survived, and which is transmitted to his representative. Nor is any new right of action given by the latter clause of section 2, to the representatives of a deceased passenger against an owner of the road as contra-distinguished from the corporation having charge of it. The term "owner" is therein used in the sense of proprietor or operator at the time of the accident. The above construction is aided by the following considerations: *a.* Were the interpretation different, the deceased might recover for his injuries independently of the statute, if he survived long enough, and after his death recovery might again be had under § 2, for the same casualty. *b.* Under the first clause of the section, in case of death from the negligence of the co-employe, a right is given the representative after the decease, which had no existence before. *c.* And under the 2d clause, in case of death resulting from defective appliances, the representative is denied a right which the deceased might have exercised, had he survived. (*Schultz vs. Pac. R. R.*, 30 Mo. 13, overruled.)—*Id.*

3. *Railroad Damage Act, construction of*—Sections 2 and 3 compared—Section 2 road liable in case of death of employe, etc., regardless of care in selecting co-employee—Representative of passenger—Action against "owner"—Meaning of

## STATUTE, CONSTRUCTION OF, continued.

*word—Section punitive—Section 3, contrawise.*—Sections two and three of the Damage Act, in regard to their intents and purposes, differ in several important particulars.

Section 2 is in derogation of the common law.

- (a.) It gives the representatives of the servant killed by the negligence of the fellow servant, an action against the master, regardless of the care bestowed by the latter in the selection or retention of the fellow workman. Such right is not a transmitted one, for the servant himself could not have sued under that section. (b.) It gives the representative of the deceased passenger an action against the owner, whether operating the road or not. The word "owner" is not restricted in that section to the operator.

It is penal in its phraseology (*sic*. making the road "pay a forfeit" and in its designation of the sum to be assessed inflexibly fixed at \$5,000 regardless of the losses entailed on the family of the servant by his death).

Section 3 was designed merely to prevent the abatement of a common law cause of action by death. It gives the representatives of the deceased an action against the operator of the road, but not against the owner not so operating it. It is not penal but compensatory in its terms, the amount recoverable being "damages" such as may be "fair and reasonable, not exceeding \$5,000."—*PER HENRY, J., DISSENTING.*—*Id.*

4. *Railroad Damage Act—Section 2, servant—Right of representatives to sue in case of defective machinery not taken away by.*—The latter clause of section 2 does not take from the representative of the servant his right of action against the master at common law, for defective machinery.—*Id.*

5. *Railroad Damage Act—"Person," meaning of term.*—The term "any person," used in section 2, includes servants as well as passengers.—*Id.*

See ADMINISTRATION, 3, (Wagn. Stat. 93, 94, §§ 2, 3; Sess. Acts 1844-5, p. 71.)

BILLS AND NOTES, 1, (Wagn. Stat. 215-16, § 8.)

CONVEYANCES, 6, (Wagn. Stat. 274, § 8.)

CORPORATION, 2, (Wagn. Stat. 294, §§ 26, 27.)

COURT, CASS COUNTY, COMMON PLEAS, 1, (Const. of Mo., p. 43, § 1.)

DAMAGES, 2, (Wagn. Stat. 250, § 5;) 4, 5, (Wagn. Stat. 310, 11, § 43;) 6, (Wagn. Stat. 519-20, § 2;) 10 (Wagn. Stat. 520, § 3;) 12, (Wagn. Stat. 446, § 4.)

DEFAULT, 1, (Wagn. Stat. 782, § 5.)

DOWER, 1, (Wagn. Stat. 541, § 10;) 2, (Wagn. Stat. 541, §§ 15, 16.)

ENTOMOLOGIST, STATE, 1, (Const. of Mo., Art. IV, §§ 20, 24; Art. X, § 19.)

EQUITY, 5, (Wagn. Stat. 1001, § 8.)

HABEAS CORPUS, 2.

HOMESTEAD, 1, (Wagn. Stat. 698, § 7.)

JUDGMENT, 2, (Wagn. Stat. 1034, § 6.)

JUSTICES' COURTS, 1, (Gen. Stat. 1865, 702, § 20.)

JUSTICES OF THE PEACE, 1, (Wagn. Stat. 845, §§ 24, 26.)

KANSAS, CITY OF, 1.

MECHANICS' LIEN, 4, (Wagn. Stat. 1020, § 38.)

MORTGAGES AND DEEDS OF TRUST, 1, (Wagn. Stat. 274 § 8.)

## STATUTE, CONSTRUCTION OF, continued.

OFFICERS, 3, (Const. of 1865, Art. V. § 14;) 4, (Const. of 1865, Art. VI, § 14;) 6 (Const. of 1875, Art. VI, § 32; Wagn. Stat. 572, § 46; Sess. Acts 1875, p. 43.)

PARTNERSHIP, 1, (Wagn. Stat. 604, § 11.)

PRACTICE, CRIMINAL, 13, (Wagn. Stat. 502, § 19;) 15, (Wagn. Stat. 455-56, § 19;) 17, (Wagn. Stat. 1089, § 22;) 27, (Adj. Sess. Acts, 1874, p. 46;) 40, (Wagn. Stat. 504, § 30;) 49, (Wagn. Stat. 1090, 1091, § 27.)

PROCESS, 3, (Wagn. Stat. 1007, § 7;) 4, (Wagn. Stat. 1053, § 10.)

RAILROADS, 8, (Sess. Acts, 1851, 483, §§ 7, 9, 10.)

REVENUE, 1, (Const. of Mo. Art. X, § 18;) 2, (Sess. Acts 1875, 121, § 8;) 5, (Const. of Mo. Art. X, § 18; Sess. Acts 1875, 121, § 7.)

SCHOOLS AND SCHOOL LANDS, 1, (Adj. Sess. Acts, 1874, 147, §§ 28, 29, 43, 65, 73, 85, 86, 90;) 2, (Wagn. Stat. 1262, § 1, *et seq.*)

TIME, COMPUTATION OF, 1, (Wagn. Stat. 847, § 2.)

TRESPASS, 1, (Adj. Sess. Acts, 1870, p. 65.)

WITNESSES, 2, 3, (Wagn. Stat. 1372, § 1.)

STOCK, KILLING OF; See Damages, 2, 5, 9; Railroads, 4

STREETS.

1. *Street openings—Damages, assessment of by commissioner—Appeal from to circuit court—Title of plaintiff—Evidence to defeat.*—Where the report of a board of commissioners to assess damages and benefits for the opening of a street, finds that A. is owner of the land condemned, and the report is approved by the town board of trustees; and from the assessment of damages and the report he appeals to the circuit court, the municipality cannot on the trial in that court introduce evidence to prove that A. was not the owner.—Wright v. The Town of Butler, et al. 165.

See Corporations, Municipal, 1, 2; Kansas, City of, 1.

SUMMONS; See Process.

SURETY.

1. *Bond—Surety—Signature of on faith of that of co-surety which proves to be forged.*—A surety upon a bond will not be discharged from liability by the fact that the name of a co-surety, on the faith of which his signature has been procured, was a forgery, nor by the fact that the surety whose name was forged gave him no information of the fact, where the condition upon which the surety signed is unknown to the officer to whom the bond is given, at the time he accepts the same. (State to use, etc. vs. Potter, 63 Mo. 212.)—State ex rel. Brown v. Baker, et al. 167.
2. *Evidence—Note signed by one as principal—Proof that the contract was that of surety.*—When one signs an obligation describing himself as principal, he renounces his right as surety, and parol evidence showing that his agreement was that of surety only, and that his liability was extinguished by reason of an extension granted to the principal without his knowledge, is inadmissible, as varying the terms of his written contract. And more especially is this true where he expressly stipulates in the instrument that no extension of time shall affect his liability. And it is immaterial in such case that the instrument signed is a note and not a specialty.—McMillan, v. Parkell, 286.
3. *Principal and surety—Extension of note—What agreement will discharge surety.*—The execution of a deed of trust by a principal debtor, whereby prop-

## SURETY, continued.

erty not subject to execution was made liable for its payment, is a good consideration for a promise to extend the time for payment of the note, and such an agreement will discharge the surety—*Sample v. Atkinson*, 504.

See Husband and Wife, 2.

## T.

## TIME, COMPUTATION OF.

1. *Justice of peace—Judgment—Motion to set aside computation of time.*—In computing the ten days' time within which a motion to set aside a default before a justice of the peace may be made (Wagn. Stat. 847, § 2), the first day after the rendition of the judgment should be excluded and the last included. Thus the judgment being rendered Oct. 28th, motion filed Nov. 7th was held to be in time.—*Reynolds v. M., K. & T. R. W. Co.*, 70.

## TRESPASS.

1. *Trespass quare clausum fregit—Amendment of action, on appeal to the circuit court.*—Act of 1870—*Proceeding, criminal in nature—Suit must be in name of State.*—In an action before a justice, brought under the act of 1870 (Adj. Sess. Acts 1870, p. 65), for unlawful entry of "plaintiff's enclosed land, in Pettis county," without more definite description, where appeal is taken to the circuit court, plaintiff may there amend by inserting in his statement a more particular description. The statement contains enough to amend by, and the amendment does not change the cause of action. But the proceeding under that act is criminal in its nature, and if not brought in the name of the State is fatally defective.—*Gilmore v. Dawson*, 310.

See Railroads, 6, 9.

## TRUSTS AND TRUSTEES.

1. *Trust, acceptance of how established—Trustee—Title as against cestui que trust—Purchase of another's title at judicial sale—Notice—Record—Possession, etc.*—Where under a deed to a trustee for a married woman, his duty was simply to permit her to have the use and occupation of the land, his knowledge of the execution of the deed and his procurement of a copy for his own use, although he never exercised any control, was held, in the absence of any disclaimer, after the lapse of six years, to amount to an acceptance. And in such a case he cannot acquire title as against his *cestui que trust*, even by purchase at a judicial sale under a title superior to that conveyed to him as a trustee, and his grantee, under the sale with notice, actual or constructive, of the rights of the beneficiary and of her heirs, takes no better title. *Held*, also, that in ejectment by the grantee against the heirs, record of the trust deed imparted to him notice in law, and the facts that he was son-in-law of the trustee and knew that the heirs were in possession, and took the land under a quit-claim deed and for an inadequate consideration, and that the position of his grantor, as trustee, was a matter of public notoriety, were circumstances sufficient to warrant a finding of actual knowledge of defendant's title. And in such suit plaintiff cannot attack their title on the ground of fraud in the conveyance made to the trustees for their benefit.—*Roberts v. Moseley*, 507.

See Mortgages and Deeds of Trust.

## U.

UNLAWFUL ENTRY; See Trespass, 1.

## V.

VACATION; See Practice, civil—Appeal.

VENUE; See Practice, criminal, 10.

## W.

WAR; See Insurance, Life, 1.

## WAR POWER OF THE UNITED STATES.

1. *War power—Payment of rent to Provost Marshal in late war—Military seizure of private property—Powers of Congress—Act of March 3rd, 1863—U. S. Constitution, 5th amendment—Limitations, statute of.*—Where defendants, being sued on the covenants of their lease, pleaded that they had paid the rent reserved to the provost marshal of the district of Missouri, under and by virtue of the order of the military commander of that district; that the payment was omitted to be made to the plaintiff, and was in fact made for and on account of the plaintiff for the public use, as a necessary means of carrying on the military operations of the government of the United States in the State of Missouri, against the insurgents in said State, who were then seeking to overthrow said government, in said State; that said payment was made by virtue and under color of authority derived from and exercised under the President of the United States, and the act of Congress of March 3rd, 1863, and the two years limitation therein contained was pleaded in bar of plaintiff's action. *Held*, that the plea is insufficient on demurrer—and this, for divers reasons;
  - 1st, It does not set forth the order on which defendant's rely, and thus tender a traversable issue.
  - 2nd, The plea sets forth no impending necessity for the acts pleaded; which urgent necessity, admitting of no delay, is all that, even in time of flagrant war, will justify military seizure of private property.
  - 3rd, Even if there had been such urgent necessity it could only have existed for *just so much money*, regardless of the *ownership*, and calling the money *plaintiff's* did not make it so, nor change that ownership.
  - 4th, However the law may be in respect of the caption, during war, of personal property or of debts due the *enemy*, Congress does not possess the power to confiscate debts due from one citizen to another, and the act in question, in so far as concerns the case at bar, is clearly unconstitutional, in that it deprives the citizen of his property by giving sanction to a mere military order issued for that purpose; that this could not be done any more than Congress could *prospectively* authorize such seizure. Because under the 5th amendment of the Constitution of the U. S., Congress is inhibited from depriving the citizen of "life, liberty or property without due process of law," and from taking "private property for public use without just compensation."
  - 5th, That the phrase "due process of law," or its legal equivalent "law of the land" does not mean a law enacted for the purpose of working the wrong; but



## WAR POWER OF THE UNITED STATES, continued.

the general law—law in its regular course of administration through the courts of justice; a law which hears before it condemns; proceeds upon inquiry and renders judgment only after trial. The act under consideration, possesses no attributes of this description, and is, for that reason, violative of the constitution.

6th, The act being thus unconstitutional, the statutory bar which contains, is unworthy consideration. Besides, the right of the plaintiff, under the terms of the lease, accrued in the year 1862. Our statute of limitations then gave, and still gives, *ten years* in which to bring suit for breach of the covenants in a lease, and Congress cannot, by a subsequently enacted law, deprive the plaintiff of the right which had thus accrued to him under our own statutes, nor overturn those statutes, nor interfere with the jurisdiction of our State courts—and the powers of Congress were not enlarged in consequence of the civil war to which the act refers.

7th, Granting that the act of Congress is in all respects valid, it can have no applicability to this case, since it appears that the defendants paid their own money, and not that of the plaintiff, to the provost marshal.—*Clark v. Mitchell*, 564.

## WARRANTY.

1. *Warranty*.—On a statement filed with a justice that defendant represented a mare to be sound when she was not sound, whereby plaintiff was damaged, etc., *held*, that there was no charge of warranty, or fraud, or deceit, and that proof relating to such issues would be improper.—*Matlock v. Meyers*, 531.

2. *Sale—Implied warranty*.—In the sale of a horse there is no implied warranty of soundness.—*Id.*

3. *Warranty—Representation will not amount to, unless*.—A representation of soundness or other quality is not necessarily a warranty. To have that effect it must be so intended and understood, and not be the expression of a mere matter of opinion.—*Id.*

4. *Warranty—What representation not*.—The representation that she is "a good mare" is not a warranty of the soundness of the animal.—*Id.*

## WILLS.

1. *Evidence—Conveyances—Proof of intention in making*.—Parol declarations as to intentions and purposes in making a deed are inadmissible.—*Owen v. Ellis*, 77.

2. *Wills and deeds—Interest and power—Construction, question of intent*.—In the construction of both wills and deeds where there is an interest and also a power, the decisive question is as to the intent of the grantor or testator.—*Id.*

3. *Will—Deed under will execute power, when*.—Where one having under a will an interest in land, coupled with a power, makes a deed for a valuable consideration, and as a conveyance of the donee's interest, the instrument cannot have the effect intended, it will be considered as an execution of the power, although no reference is made to the power.—*Id.*

4. *Will—Deed under by widow—When construed as execution of power—Payment of debts—Implied power of sale for—Signature of executrix*.—By the terms of a will, a life estate in testator's lands was vested in the widow "my just debts first to be paid," and "the property never to go out of the family in any other way than to pay debts, or for the ordinary expenses of the family."

## WILLS, continued.

At an advanced age, and for value, she conveyed a certain portion of the lands (which were unimproved and wild) by a fee simple warranty deed, in the usual form, but signing herself as executrix: *Held*,

- 1st. Her signature as executrix was merely a *descriptio personæ*.
- 2nd. *Semble*, that in view of the provisions of our statute touching administration, and in the absence of more specific provisions in the will relating to sale of lands for payment of debts, the clause "my just debts first to be paid" would not be construed as conferring an implied power for that purpose.
- 3rd. Her intention was manifestly to convey an absolute title, and it was very doubtful whether any reference to the power was necessary, but at all events very slight circumstances would justify an application of the deed to the power, and not to the life estate, and the grantee under her deed would then take a fee simple title.—*Id.*
5. *Wills—Devises—What construed to be for life only—Executory agreement for sale of land—Purchase money, payment of, not enforceable, when.*—A will after bequeathing to testator's grandchildren, A. and B., certain described real estate, contained the following provision: "If either of my grandchildren shall die before lawful age, or before leaving a lawful heir or heirs, the above property shall descend to the survivor and his heirs or legal representatives; and if both grandchildren shall die before marriage, or leave no lawful issue by marriage, said estate shall be sold for the benefit of the poor," etc., etc. *Held*, that the will gave only a life estate to A. & B.; that the arrival of A. at a majority and his marriage, and the birth of children to him did not change the character of his estate, and authorize him to convey a fee simple title; and in such case it was held that he could not enforce an agreement (being an executory one) under which the bargainee agreed to pay him a given sum of money "provided that within twelve months" the bargainor should be "competent to give him an unincumbered title to the land."—*Thompson v. Craig*, 312.

## WITNESSES.

1. *Witness act—Where party to contract, etc. is dead, opposite party incompetent for any purpose.*—In suit by the indorsee against the maker of a promissory note, the payee whereof is dead at the date of the suit, defendant cannot testify as to a payment on the note made by himself to the payee. And he is incompetent to testify at all in the case.—*Angell v. Hester*, 142.
2. *Witness act—Common law right to testify, not affected by.*—Under the witness act (Wagn. Stat. 1872, § 1), in any case where at common law a party to a suit could testify, he may still do so, notwithstanding the death of the other party to the contract or cause of action.—*Id.*
3. *Witness act—Suit by executor on note made to testator—Written discharge by—Testimony of defendant as to—Paper inadmissible, when—Refusal of instructions.*—Where suit is brought by an executor on a promissory note given to the testator, defendant is incompetent to testify as to the execution of a paper made by the testator discharging defendant from his obligation, or as to any facts connected with the transaction. (Wagn. Stat., 1872-3, § 1.) Without proof of its execution the paper is not admissible in evidence. And instructions predicated on such instrument are properly refused.—*Weiland v. Weyland*, 168.

See Evidence, 4, 5, 6; Husband and Wife, 2; Practice, criminal, 44, 46, 47.

WORSHIP, DISTURBING; See Practice, criminal, 40.

RULES FOR THE GOVERNMENT  
OF THE SUPREME COURT

Adopted at the April term, 1877.

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Chief Justice, his duty.

RULE 1.—The Chief Justice shall superintend matters of order in the court room.

Motion to be written, signed and filed.

RULE 2.—All motions in a cause shall be in writing, signed by counsel and filed of record.

Argument of motions.

RULE 3.—No motion shall be argued unless by the direction of the court.

Taking record from clerk's office.

RULE 4.—No member of the bar shall be permitted to take a record from the clerk's office without the written permission of some judge of the court.

Diminution of record, suggestion after joinder in error.

RULE 5.—No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

Application for certiorari.

RULE 6.—Whenever a certiorari may be applied for, there shall be an affidavit of the defect in the transcript which it is designed to supply, and at least twenty-four hours' notice shall be given to the adverse party or his attorney previous to the making of the application.

Notices of writs of error.

RULE 7.—All notices of writs of error, with the acceptance, waiver or return of service endorsed thereon, shall be filed with the clerk of this court, and be by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

**Reviewing instructions.**

**RULE 8.**—In actions at law it shall not be necessary, for the purpose of reviewing in the Supreme Court the action of any circuit court or any other court, having, by statute, jurisdiction of civil cases in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance be embodied in the bill of exceptions, but it shall be sufficient for the purpose of such review that the bill of exceptions state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instructions founded on it.

**Bill of exceptions—whether there was evidence tending to prove an issue.**

**RULE 9.**—If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court of first instance shall be of opinion that there was such evidence, it shall be the duty of the court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the court that the same tends to prove such fact or issue.

**Bill of exceptions—whether there was evidence tending to prove an issue.**

**RULE 10.**—If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions, detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the court that it does not so tend, which bill of exceptions shall be allowed by the court by which the cause is tried.

**Exceptions to admission or exclusion of evidence.**

**RULE 11.**—When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

**Bill of exceptions in equity cases.**

**RULE 12.**—In cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

**Rule as to making out transcripts.**

**RULE 13.**—The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken or writ of error is sued out, shall not (unless an exception is saved to the regularity of the process, or its execution, or to the acquiring by the court of jurisdiction in the cause) in making out transcripts of the record for the Supreme Court, set out the original or any subsequent writ or the return thereof; but in lieu thereof shall say (e. g.) “summons issued October 2, 1871, executed October 5, 1781,” and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleading as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter touching the organization of the court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by the bill of exceptions.

**Presumptions in support of bills of exceptions.**

**RULE 14.**—The only purpose of a statement, in a bill of exceptions, that it sets out all the evidence in a cause, that the Supreme Court may have before it the same matter which was decided by the court of first instance, it shall be presumed as a matter of fact in all bills of exceptions, for the future, that they contain all the evidence applicable to any particular ruling to which exception is saved.

**Abstracts to be filed.**

**RULE 15.**—In all civil cases the appellant or plaintiff in error shall file in this court, on or before the day next preceding the day on which the cause is docketed for hearing, seven copies of an abstract or abridgement of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision. The appellant or plaintiff in error shall also deliver a copy of said extract to the attorney of the appellee or the defendant in error, ten days before the day on which the cause is docketed for hearing, and if the counsel for the appellee or defendant in error shall deem the abstract of the appellant or plaintiff in error imperfect or



unfair, he may within eight days after receiving the same, deliver to the counsel of the appellant or plaintiff in error one copy, and to the clerk of this court seven copies of such further or additional abstract as he shall deem necessary to a full understanding of the questions presented to this court for decision.

**Briefs to be filed.**

**RULE 16.**—It shall be the duty of counsel in all cases to file with the clerk, on the day next preceding the day on which the cause is docketed for hearing, seven copies of a brief which shall contain a clear and concise statement of the matters in issue, and a further statement, in numerical order, of the points or legal propositions intended to be relied on in argument, accompanied by a citation of authorities supporting each proposition. To this may be added such argument as counsel may desire to make in writing; all of which shall be signed by counsel.

**Citing authorities in briefs.**

**RULE 17.**—In citing authorities, in support of any proposition, it shall be the duty of the counsel to give the names of the parties to any case cited from any report of the adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, section, paging and side paging shall be set forth.

**Appellant's brief to allege errors complained of.**

**RULE 18.**—The brief filed on behalf of the appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted at the argument to errors not thus specified, unless for good cause shown the court shall otherwise direct.

**Failure to comply with rules 15 and 16.**

**RULE 19.**—If any appellant or plaintiff in error, in any civil cause, shall fail to comply with rules numbered 15 and 16, the court, when the cause is called for hearing, will dismiss the appeal or writ of error; or at the option of respondent or defendant in error, continue the cause at the costs of the party in default.



**Agreed cases.**

**RULE 20.**—Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligibly present to the Supreme Court, or any appellate court, the matters intended to be reviewed ; and this statement, with a certificate by the judge before whom the cause was tried that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in all appellate courts, and the judgment rendered in the court of first instance shall be affirmed or reversed according to the opinion entertained by the Supreme Court respecting the same.

**Hearing causes submitted on printed copy of record or agreed statement.**

**RULE 21.**—Whenever within the first thirty days of any term of this court the counsel on both sides of any cause shall present to the court (by delivering the same to the Clerk) ten printed copies of the record, or of a statement agreed upon as presenting the full history of the cause, together with ten printed copies of the arguments on both sides, and submit the cause to the court upon such printed record or statements and arguments, the court will, without regard to the place on the docket of the cause so submitted, consider and decide the same as if it had been reached in its regular order, argued and submitted, on the day when it shall be submitted under this rule. The record (or statement) and the arguments in such case shall be endorsed in manuscript thus : “ Submitted under rule XXI,” and signed by the respective counsel.

**Motion for rehearing.**

**RULE 22.**—Motions for a rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel, but no motion for a rehearing shall be filed after the final adjournment of the court.

**Motion for affirmance.**

**RULE 23.**—On motion for affirmance under section 49, article 13, chapter 110, Wagner's Statutes, the mere fact that the appellant has on file, or presents a copy of the transcript at the time such motion is made, shall not *of itself* be deemed "good cause" within the meaning of said section.

**Former rules rescinded.**

**RULE 24.**—All rules not included in the foregoing enumeration are hereby rescinded.

